Administrative Conference of the United States

74th Plenary Session
June 17, 2021

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agenda for 74th Plenary Session

Thursday, June 17, 2021

9:30 a.m.	Call to Order Opening Remarks by Vice Chairman Matthew L. Wiener Initial Business (Vote on Adoption of Minutes of December 2020 Plenary Session and Resolution Governing the Order Business)
9:50 a.m.	Consider Proposed Recommendation: *Clarifying Statutory Access to Judicial Review of Agency Action*
11:05 a.m.	Consider Proposed Recommendation: *Mass, Computer-Generated, and Fraudulent Comments*
12:20 p.m.	Update on Pending Projects by Research Director Reeve T. Bull
12:30 p.m.	Lunch Break
1:00 p.m.	Remarks by Council Member Adrian Vermeule, Ralph S. Tyler Professor of Law, Harvard Law School (*Law and Leviathan: Redeeming the Administrative State*)
1:15 p.m.	Consider Proposed Recommendation: *Periodic Retrospective Review*
2:30 p.m.	Consider Proposed Recommendation: *Early Input on Regulatory Alternatives*
3:45 p.m.	Consider Proposed Recommendation: *Virtual Hearings in Agency Adjudication*
5:00 p.m.	Adjourn

Resolution Governing the Order of Business

The time initially allotted to each item of business is separately stated in the agenda. Individual comments from the floor shall not exceed five minutes, unless further time is authorized by unanimous consent of the voting members present. A majority of the voting members present may extend debate on any item for up to 30 additional minutes. At any time after the expiration of the time initially allotted to an item, the Chair shall have discretion to move the item to a later position in the agenda.

Unless the Chair determines otherwise, amendments and substitutes to recommendations that have been timely submitted in writing to the Office of the Chairman before the meeting will receive priority in the discussion of any proposed item of business; and other amendments and substitutes to recommendations will be entertained only to the extent that time permits.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

73rd Plenary Session

Minutes

December 16 - 17, 2020

I. Call to Order and Opening Remarks by Vice Chairman Matt Wiener

The 73rd Plenary Session and first full virtual Plenary Session of the Administrative Conference of the United States (ACUS) commenced on December 16, 2020, at approximately 10:00 a.m. ACUS Vice Chairman Matt Wiener called the meeting to order. He introduced the Council members and the new members who joined ACUS since the last plenary session. Vice Chairman Wiener then recognized the late Judge Stephen F. Williams of the U.S. Court of Appeals and his many contributions to ACUS throughout his career.

II. Office of the Chairman Projects

Vice Chairman Wiener noted the continued vacancy of the position of ACUS Chairman. He then briefly described some of the ongoing projects of the Office of the Chairman. He noted that the Office of the Chairman continues to facilitate regular meetings of the Council of Independent Regulatory Agencies (CIRA) and the Interagency Roundtable. He also introduced the newly established Council on Federal Agency Adjudication, which provides a forum for the heads of agency adjudication offices to exchange information about procedural innovations, best management practices, and other subjects of mutual interest.

Vice Chairman Wiener then noted the progress of several ongoing Office of the Chairman projects, including a new COVID-19 resource guide for agency lawyers, a new program to collect state innovations in administrative procedure to share with federal agencies, the Working Group on Compiling Administrative Records, and the periodic issuance of short topical guides on administrative procedure known as Information Interchange Bulletins. He highlighted eight new publications that either had been released or imminently would be, including a statutorily required annual report on awards against the government under the Equal Access to Justice Act, a statutorily required report on ways the Social Security Administration may improve information sharing in its representative payee program, two reports on the use of artificial intelligence in federal agencies, a report on administrative recusal rules for agency adjudicators, a report on the legal considerations for remote hearings in agency adjudications, the update of the electronic edition of the *Federal Administrative Procedure Sourcebook*, and the forthcoming publication of the *Sourcebook of Federal Judicial Review Statutes*.

Vice Chairman Wiener introduced several upcoming Office of the Chairman reports for the next year, including a report on alternative dispute resolution, a report on the assignment of both enforcement and adjudicative functions to agency heads, and a report on the different types of guidance documents agencies issue to identify considerations that result in the use of one type of guidance document over another. Vice Chairman Wiener also noted the several forums ACUS

hosted in the past year, including one on the use of nationwide injunctions against agency actions in federal courts, another on artificial intelligence in the administrative state, and one on issues in federal agency adjudication.

III. Implementation Success

Vice Chairman Wiener noted four recent developments in the implementation of past Conference projects. First, he noted that the Judicial Conference of the United States proposed amendments to the Federal Rules of Civil Procedure governing judicial review of Social Security decisions in federal district courts, based on Recommendation 2016-3, *Special Rules for Social Security Litigation in District Court*. Second, he noted that the Office of Personnel Management (OPM) recently proposed a rule on the hiring of administrative law judges that embodies an important principle set forth in Recommendation 2019-3, *Agency Recruitment and Selection of Administrative Law Judges*, that there should be no insider or "word-of-mouth" hiring and that agencies should recruit so as to receive an "optimal and broad pool" of candidates. Third, he noted that agencies continue to post guidance documents on their websites in compliance with recent executive orders that align with three ACUS recommendations on guidance. Many such postings, moreover, reflect the best practices ACUS offered in Recommendation 2019-3, *Public Availability of Agency Guidance Documents*. Fourth, he noted that the recent Executive Order 13,960, *Promoting Trustworthy Artificial Intelligence in the Federal Government*, is sensitive to issues related to privacy and transparency reflected in ACUS reports on the subject.

IV. Plenary Procedures

Before consideration of the proposed recommendations, Vice Chairman Wiener reviewed the rules for debating and voting on matters at the Plenary Session. Conference members approved the minutes from the 72nd Plenary Session and adopted the order of business for the 73rd Plenary Session. Vice Chairman Wiener then thanked the members, staff, committee chairs, and consultants for working so hard to complete these recommendations, particularly in light of the ongoing COVID-19 pandemic.

V. Proposed Recommendation on Rules on Rulemakings

Vice Chairman Wiener introduced the proposed Recommendation, thanking Connor N. Raso, Government Member and Chair of the Committee on Regulation, and Todd Rubin, ACUS staff counsel and in-house researcher on the project. Mr. Rubin provided an overview of the supporting research. Mr. Raso discussed the Committee's deliberations. Vice Chairman Wiener then moved to the manager's amendment, which was adopted.

Following general discussion, Vice Chairman Wiener turned to an amendment proposed by the Council. Vice Chairman Wiener explained that the amendment inserted a footnote explaining that some rules on rulemakings purport to be non-judicially enforceable, and that ACUS does not take a position on the legal effect of such statements. The proposed amendment also struck Paragraph 7, which encouraged agencies to consider including provisions that provide that a rule on rulemakings is not judicially enforceable. After discussion of the amendment, Vice Chairman Wiener called for a vote, and the amendment was adopted.

Vice Chairman Wiener then proceeded to two pre-submitted amendments. The first amendment, proposed by Jack M. Beermann, Public Member, inserted several terms pertaining to interagency communication and ex parte contacts in the appendix. Upon discussion of the amendment, Mr. Beermann agreed to modify his amendment to strike one of those terms. The amendment, as modified, was adopted. The second amendment, proposed by Ronald M. Levin, Senior Fellow, and moved by Mr. Raso, inserted a paragraph in the preamble suggesting that agencies include a statement in certain rules on rulemakings indicating that such rules do not confer any rights or benefits. After a brief discussion, the amendment was not adopted. During further consideration of the proposed Recommendation, Jeffrey S. Lubbers, Special Counsel, proposed an amendment, moved by Renée M. Landers, Public Member, to change the title of the proposed Recommendation to *Agency Statements to the Public on Their Rulemaking Practices*. After discussion, the amendment was not adopted.

Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

VI. Proposed Recommendation on Protected Materials in Public Rulemaking Dockets

Vice Chairman Wiener introduced the proposed Recommendation, thanking Adam J. White, Public Member and Acting Chair of the Committee on Rulemaking, and Christopher Yoo, project consultant. Mr. Yoo provided an overview of the supporting research. Mr. White discussed the Committee's deliberations. Vice Chairman Wiener then moved to the manager's amendment, which was adopted.

Vice Chairman Wiener turned to the proposed amendment from the Council. The proposed amendment changed the definition of "personal information" to align with the Privacy Act. After brief discussion, the proposed amendment from the Council was adopted. Mr. Beermann and Robert J. Girouard, Government Member, then proposed changes to the definition of "personal information." Mr. Beerman suggested eliminating the phrase "maintained by an agency," and Mr. Girouard suggested giving examples of personal information. These amendments were adopted.

Vice Chairman Wiener then proceeded to the pre-submitted amendments. The first amendment, proposed by Mr. Lubbers, added a citation of a pertinent executive order. Ronald M. Cass, Council Member, moved the amendment, and it was adopted. The second amendment, proposed by Mr. Beermann, added a sentence to the preamble that noted that the Recommendation does not address protected materials in rulemaking explanations. After brief discussion of the amendment, it was adopted, with the exact language remitted to the Committee on Style. The third and fourth amendments, proposed by Mr. Lubbers, added a cross-reference to Recommendation 2020-1, *Rules on Rulemakings*, and added a sentence advising agencies to inform the public when they deny a request to treat material as protected, respectively. The amendments were moved by Sidney A. Shapiro, Public Member, and Mr. Cass respectively, and were adopted.

During further consideration of the proposed Recommendation, Mr. Cass and John F. Duffy, Public Member, proposed an amendment to Paragraph 2(c) to change a categorical prohibition on third-party submissions to a notification that such submissions may violate the

law. After brief discussion, the amendment was adopted. Vice Chairman Wiener called for a vote on the Recommendation as amended, and it was adopted.

VII. Proposed Statement on Agency Use of Artificial Intelligence

Vice Chairman Wiener introduced the proposed Statement and thanked the Ad Hoc Committee on Agency Use of Artificial Intelligence for their work on the project. He then thanked John Cooney, Senior Fellow and Chair of the Ad Hoc Committee, and Daniel Ho, David Engstrom, Catherine Sharkey, and Cary Coglianese, project consultants. Mr. Ho and Mr. Coglianese provided overviews of the reports. Mr. Cooney discussed the Committee's deliberations. Vice Chairman Wiener then moved to the manager's amendment, which was adopted.

Vice Chairman Wiener turned to four amendments and comments from the Council. These amendments clarified the Statement's meaning in several locations. All four amendments were adopted. Vice Chairman Wiener then turned to a comment from the Council concerning the use of the word "population" in the preamble. After discussion on the floor, the Mr. Cass and Jennifer Dickey, Council Member, suggested removing the word as well as the surrounding clause to help simplify the sentence. The amendment was adopted. Vice Chairman Wiener then turned to second Council comment requesting clarification on the use of the word "tolerable" in the preamble and whether it was meant to be used as a legal or technical term of art. After discussion, Mr. Engstrom suggested replacing the word with the phrase "without reliance on AI techniques." Mr. Cass and Ms. Dickey moved the suggested language and the amendment was adopted.

Vice Chairman Wiener turned to several pre-submitted amendments and comments. The first comment, submitted by Mr. Lubbers, concerned the effect of the Paperwork Reduction Act on collection of data for use in artificial intelligence tools. Mr. Coglianese proposed language to note that statutes and regulations, including the Paperwork Reduction Act, might bear on agencies' uses of artificial intelligence as a collector and consumer of data. Vice Chairman Wiener moved Mr. Coglianese's proposed language as an amendment and the amendment was adopted. Mr. Beermann proposed amending the Statement's section on security to note that artificial intelligence systems might be "hacked," and that amendment was adopted. Stephanie Tatham, Government Member, proposed an amendment adding language about addressing information security risks. After brief discussion, a modified version of that amendment was adopted and incorporated in a footnote. Mr. Beermann then proposed an amendment changing "human beings" to "people," which was adopted. Ms. Tatham proposed an amendment adding additional considerations for agencies to take into account when developing evaluation and oversight mechanisms for their artificial intelligence systems. That amendment was also adopted.

Vice Chairman Wiener proceeded with discussion of floor amendments. Mr. Cooney, speaking on behalf of Senior Fellow Warren Belmar, suggested eliminating the word "unwanted" from the term "unwanted biases." After some discussion, Kristin Hickman, Public Member and Chair of the Committee on Judicial Review, proposed an amendment to replace "unwanted" with "harmful." Vice Chairman Wiener moved the amendment proposed by Ms. Hickman, and that amendment was adopted.

Vice Chairman Wiener called for a vote on the Statement as amended, and the Statement was adopted.

VIII. Proposed Recommendation on Agency Appellate Systems

Vice Chairman Wiener recused himself from participating in his official capacity as Vice Chairman for the proceedings because ACUS's bylaws require recusal when an ACUS member also serves as the project consultant. Mr. Cass then introduced the proposed Recommendation to the members. He thanked Nadine Mancini, Government Member and Chair of the Committee on Adjudication, along with Vice Chairman Wiener and Christopher Walker, Public Member, who served as project co-consultants. Mr. Walker provided an overview of the report. Ms. Mancini then discussed the Committee's deliberations. Mr. Cass then moved to the manager's amendment, which was adopted.

Mr. Cass turned to the two proposed amendments from the Council. The first proposed amendment revised the last paragraph of the preamble to include further recognition concerning the impact of resources available to agencies. The second proposed amendment clarified the wording of the Paragraph 1 concerning the objectives of appellate review. Both proposed amendments from the Council were adopted without discussion and in their original form.

Mr. Cass then turned to several pre-submitted amendments and comments. Based on the adopted amendments from the Council, Emily Bremer, Public Member, withdrew her pre-submitted amendment. Mr. Cass then turned to the second pre-submitted amendment by Jonathan Siegel, Public Member. This amendment added language to reflect a relevant case and statute governing agency appellate review. After discussion and additional proposed changes to the amendment, the amendment was adopted as amended. During further consideration of the proposed Recommendation, Andrew Vollmer, Public Member, proposed an amendment concerning the circumstances in which appellate review mechanisms may be appropriate. After brief discussion, the amendment was not adopted.

Mr. Cass called for a vote on the Recommendation as amended, and it was adopted. Vice Chairman Wiener adjourned the Plenary for the day.

IX. Call to Order by Vice Chairman Wiener

Vice Chairman Wiener reconvened the second day of the 73rd Plenary Session on December 17, 2020, at approximately 10:00 a.m. Vice Chairman Wiener then introduced the Honorable Paul J. Ray, Administrator of the Office of Information and Regulatory Affairs (OIRA).

X. Remarks by the Honorable Paul J. Ray, Administrator of the Office of Information and Regulatory Affairs

The Honorable Paul J. Ray thanked the members and staff of ACUS for their contributions and commended ACUS on its research and recommendations. He discussed various recent OIRA initiatives and how they have been informed by ACUS work, including: two executive orders on agency use of guidance documents, which built off ACUS Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, and

Recommendation 2017-5, *Agency Guidance Through Policy Statements*; an executive order and implementing memo on adjudication norms and procedures, for which recent ACUS initiatives were highly influential; and the adoption of Recommendation 2018-1, *Paperwork Reduction Act Efficiencies*, as well as other suggestions made by ACUS concerning how OIRA manages Paperwork Reduction Act approvals. He also highlighted several areas where he thought ACUS's work will be particularly valuable in the future, including the new ACUS Council on Federal Agency Adjudication, the new ACUS Recommendation on *Rules on Rulemaking*, the forthcoming project on the classification of guidance, and the ACUS Statement on *Agency Use on Artificial Intelligence*. He then thanked Vice Chairman Wiener for his stewardship of the agency.

XI. Proposed Recommendation on Government Contract Bid Protests Before Agencies

Vice Chairman Wiener introduced the proposed Recommendation and thanked Aaron Nielson, Public Member and Chair of the Committee on Administration and Management, and Christopher Yukins, project consultant. Mr. Yukins provided an overview of the report. Mr. Nielson discussed the Committee's deliberations. Vice Chairman Wiener then moved to the manager's amendment, which was adopted, and the two stylistic amendments from the Council, which were adopted.

Vice Chairman Wiener then turned to several pre-submitted amendments and comments. Alan Morrison, Senior Fellow, suggested changes to language in the preamble about perceived conflicts of interest. After brief discussion and supplementary proposed language by Mr. Duffy, Mr. Morrison's proposed change was adopted as amended. Discussion proceeded to several amendments by Mr. Girouard, consisting largely of language to clarify the Recommendation's meaning in several locations. All of Mr. Girouard's amendments were adopted except for one, which proposed adding the language "on a fiscal year basis" to Paragraph 11 of the Recommendation. After brief discussion, Mr. Girouard withdrew his amendment. Mr. Duffy then moved to amend certain language about parties who lose their agency-level bid protests in the preamble. Mr. Duffy's proposed amendment was modified on the floor, then adopted.

Vice Chairman Wiener addressed Mr. Lubbers' comment concerning the clarity of the preamble with regards to the relationship between different forums for challenging awards of government contracts. After some discussion, Mr. Cass moved to include the additional language identifying the relationship between different forums as an amendment, and that language was adopted. Susan Braden, Public Member, then remarked on the need to further clarify the relationship between the different bid protest forums. After some discussion, Anne Joseph O'Connell, Senior Fellow, suggested the issue could be at least partially addressed with a reference to an Information Interchange Bulletin previously published by the Administrative Conference. The suggestion was adopted as an amendment with the exact language remitted to the Committee on Style.

Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

XII. Pending Assembly Projects

Vice Chairman Wiener announced that proceedings would continue with a brief presentation by Reeve Bull, ACUS Research Director, on pending and forthcoming Assembly projects, explaining that Assembly projects are those intended to result in a formal recommendation of the Assembly. Mr. Bull then briefly described several pending or potential Assembly projects, including: *Early Input on Regulatory Alternatives*; *Mass, Computer-Generated, and Fraudulent Comments*; *Periodic Retrospective Review*; *Procedural Fairness in Judicial Review*; and *Virtual Hearings in Agency Adjudication*.

XIII. Proposed Recommendation on Public Availability of Information About Agency Adjudicators

Vice Chairman Wiener introduced the proposed Recommendation and thanked Ms. Mancini; Kent Barnett, Public Member and project consultant; and Leigh Anne Schriever, staff attorney and in-house researcher. Mr. Barnett discussed his prior research, and Ms. Schriever discussed her research and report for this project. Vice Chairman Wiener moved to the manager's amendment, which was adopted.

Following general discussion, Vice Chairman Wiener proceeded to the amendment from the Council, which proposed to amend the language in Appendix A to better reflect the fact that the provisions governing the removal of Administrative Law Judges are statutorily required. This amendment was adopted.

Vice Chairman Wiener then proceeded to the pre-submitted amendments. The first amendment, proposed by Mr. Levin, suggested changing the title of the Recommendation to *Publication of Policies Governing Agency Adjudicators*. It was moved by Mr. Duffy and was approved. The next amendment, submitted as a comment by Richard Pierce, Senior Fellow, proposed adding language about ongoing litigation surrounding the constitutional status of the appointment of agency adjudicators. Vice Chairman Wiener moved on to another amendment to allow for the drafting of language to address Mr. Pierce's comment. Mr. Duffy was then recognized, and he proposed adding a mention of legal authority to Paragraph 1 of the Recommendation. The addition of the words "along with the legal authority" was adopted. Vice Chairman Wiener returned to Mr. Pierce's comment, and Ms. Hickman proposed language to add to the preamble, which was adopted. The next pre-submitted amendment addressed came from Mr. Morrison, who proposed adding "position descriptions" to Paragraph 2 of the Recommendation. Mr. Cass moved the amendment, and it was adopted.

Vice Chairman Wiener then recognized Mr. Morrison, who proposed deleting part of the last sentence of Paragraph 1 because it was redundant with the first half of the sentence about Freedom of Information Act exemptions, and that amendment was adopted. Following additional discussion and other amendments, Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

XIV. Remarks by Jonathan R. Siegel, Public Member, on the *Sourcebook of Federal Judicial Review Statutes*

Vice Chairman Wiener introduced Mr. Siegel and thanked ACUS staff members and project advisors for their research and work on this project. Mr. Siegel then provided an

overview of the project, which catalogs all provisions in the U.S. Code that govern federal judicial review of agency action, and thanked ACUS staff for their work.

XV. Proposed Recommendation on Agency Litigation Webpages

Vice Chairman Wiener introduced the proposed Recommendation on Agency Litigation Webpages and thanked Ms. Hickman, Public Member and Chair of the Committee on Judicial Review, and Mark Thomson, staff attorney and in-house researcher. Mr. Thomson provided an overview of the report. Ms. Hickman discussed the Committee's deliberations. Vice Chairman Wiener asked if any members objected to Brady Toensing of the Department of Justice being granted permission to participate in the Assembly's discussion of the project. Mr. Toensing was granted permission to participate in the discussion. Vice Chairman Wiener then moved to the manager's amendment, which was adopted.

Vice Chairman Wiener turned to four Council amendments. The first two Council amendments—one clarifying the application of the phrase "bearing on agencies' regulatory or enforcement activities," and another qualifying language about the Freedom of Information Act— were adopted. The third Council amendment, which suggested that agencies recognize that some types of agency litigation materials may be of greater significance than others, was withdrawn after several remarks. In lieu of the third proposed Council amendment, Ms. Hickman proposed amending Paragraph 5 of the Recommendation with language tracking the substance of the proposed Council amendment. Ms. Hickman's proposed amendment was adopted. Discussion then proceeded to the fourth Council amendment, concerning how agencies with component units might organize their litigation webpages, which was adopted.

Vice Chairman Wiener then began deliberation on pre-submitted amendments. Mr. Morrison suggested adding language at the end of the preamble explaining how agency officials can ensure that they have access to litigation filings made when another agency litigates on their agency's behalf. Ms. Hickman proposed an amendment revising the language proposed by Mr. Morrison and adding it as a footnote. After some discussion among Ms. Hickman, Mr. Morrison, and Mr. Toensing, that amendment was adopted. Discussion proceeded to an amendment proposed by Ms. Bremer to change language in Paragraph 1 of the Recommendation to read "should provide" rather than "should consider providing." After some discussion, Ms. Bremer withdrew the amendment. Discussion proceeded to the remaining pre-submitted amendment, from Mr. Lubbers proposing reordering a list of factors agencies should consider when determining whether to provide access to agency litigation webpages. Ms. Hickman moved that amendment, and it was adopted.

Vice Chairman Wiener then opened the floor for additional proposed amendments. Mr. Levin proposed a minor stylistic change to Paragraph 1 of the Recommendation, which Ms. Hickman moved as an amendment. That amendment was adopted. Mr. Toensing proposed a slight modification to the newly amended language in Paragraph 1 of the Recommendation but, after a comment from Ms. Hickman, withdrew the proposal. Ms. Landers proposed further changing the first paragraph by replacing "bear on" with "relate to." Mr. Elliot objected and, after a comment from Ms. Hickman, the amendment was rejected.

Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

XVI. Closing Remarks and Adjournment

Vice Chairman Wiener thanked the participants for their hard work and for attending the plenary session. Vice Chairman Wiener thanked ACUS staff for planning and preparing for the plenary session, and particularly Harry Seidman, Chief Financial and Operations Officer; and Shawne McGibbon, General Counsel. He then adjourned the 73rd Plenary Session.

Bylaws of the Administrative Conference of the United States

[The numbering convention below reflects the original numbering that appeared in Title 1, Code of Federal Regulations (CFR), Part 302, which was last published in 1996. Although the original numbering convention is maintained below, the bylaws are no longer published in the CFR. The official copy of the bylaws is currently maintained on the Conference's website at https://www.acus.gov/policy/administrative-conference-bylaws.]

§ 302.1 Establishment and Objective

The Administrative Conference Act, 5 U.S.C. §§ 591 *et seq.*, 78 Stat. 615 (1964), as amended, authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the federal government. The purposes of the Administrative Conference are to improve the administrative procedure of federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest, to promote more effective participation and efficiency in the rulemaking process, to reduce unnecessary litigation and improve the use of science in the regulatory process, and to improve the effectiveness of laws applicable to the regulatory process. The Administrative Conference Act provides for the membership, organization, powers, and duties of the Conference.

§ 302.2 Membership

(a) General

(1) Each member is expected to participate in all respects according to his or her own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly, either in person or by telephone or videoconference if that is permitted for the session or meeting involved. When a member has failed to attend two consecutive Conference functions, either plenary sessions, committee meetings, or both, the Chairman shall inquire into the reasons for the nonattendance. If not satisfied by such reasons, the Chairman shall: (i) in the case of a Government member, with the approval of the Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention, or (ii) in the case of a non-Government member, with the approval of the Council, terminate the member's appointment, provided that where the Chairman proposes to remove a non-Government member, the member first shall be entitled to submit a written statement to the Council. The foregoing

does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations.

(b) Terms of Non-Government Members

Non-Government members are appointed by the Chairman with the approval of the Council. The Chairman shall, by random selection, identify one-half of the non-Government members appointed in 2010 to serve terms ending on June 30, 2011, and the other half to serve terms ending on June 30, 2012. Thereafter, all non-Government member terms shall be for two years. No non-Government members shall at any time be in continuous service beyond three terms; provided, however, that such former members may thereafter be appointed as senior fellows pursuant to paragraph (e) of this section; and provided further, that all members appointed in 2010 to terms expiring on June 30, 2011, shall be eligible for appointment to three continuous two-year terms thereafter.

(c) Eligibility and Replacements

(1) A member designated by a federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he or she leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he or she enters full-time government service. In the event a non-Government member of the Conference appointed by the Chairman resigns or becomes ineligible to continue as a member, the Chairman shall appoint a successor for the remainder of the term.

(d) Alternates

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, a member may designate (by e-mail) a suitably informed alternate to participate for a member in a meeting of the committee, and that alternate may have the privilege of a vote in respect to any action of the committee. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph (a)(2) of this section.

(e) Senior Fellows

The Chairman may, with the approval of the Council, appoint persons who have served as members of or liaisons to the Conference for six or more years, former members who have served as members of the federal judiciary, or former Chairmen of the Conference, to the position of senior fellow. The terms of senior fellows shall terminate at 2-year intervals in even-numbered years, renewable for additional 2-year terms at the discretion of the Chairman with the approval of the Council. Senior fellows shall have all the privileges of members, but may not

vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

(f) Special Counsels

The Chairman may, with the approval of the Council, appoint persons who do not serve under any of the other official membership designations to the position of special counsel. Special counsels shall advise and assist the membership in areas of their special expertise. Their terms shall terminate at 2-year intervals in odd-numbered years, renewable for additional 2-year terms at the discretion of the Chairman with the approval of the Council. Special counsels shall have all the privileges of members, but may not vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

§ 302.3 Committees

(a) Standing Committees

The Conference shall have the following standing committees:

1. Committee on Adjudication
2. Committee on Administration
3. Committee on Judicial Review
4. Committee on Regulation
5. Committee on Rulemaking

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. The Chairman, with the approval of the Council, may establish additional standing committees or rename, modify, or terminate any standing committee.

(b) Special Committees

With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. Such special committees shall expire after two years, unless their term is renewed by the Chairman with the approval of the Council for an additional period not to exceed two years for each renewal term. The Chairman may also terminate any special committee with the approval of the Council when in his or her judgment the committee's assignments have been completed.

(c) Coordination

The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

§ 302.4 Liaison Arrangements

(a) Appointment

The Chairman may, with the approval of the Council, make liaison arrangements with representatives of the Congress, the judiciary, federal agencies that are not represented on the Conference, and professional associations. Persons appointed under these arrangements shall have all the privileges of members, but may not vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

(b) Term

Any liaison arrangement entered into on or before January 1, 2020, shall remain in effect for the term ending on June 30, 2022. Any liaison arrangement entered into after January 1, 2020, shall terminate on June 30 in 2-year intervals in even-numbered years. The Chairman may, with the approval of the Council, extend the term of any liaison arrangement for additional terms of two years. There shall be no limit on the number of terms.

§ 302.5 Avoidance of Conflicts of Interest

(a) Disclosure of Interests

(1) The Office of Government Ethics and the Office of Legal Counsel have advised the Conference that non-Government members are special government employees within the meaning of 18 U.S.C. § 202 and subject to the provisions of sections 201-224 of Title 18, United States Code, in accordance with their terms. Accordingly, the Chairman of the Conference is authorized to prescribe requirements for the filing of information with respect to the employment and financial interests of non-Government members consistent with law, as he or she reasonably deems necessary to comply with these provisions of law, or any applicable law or Executive Order or other directive of the President with respect to participation in the activities of the Conference (including but not limited to eligibility of federally registered lobbyists).

(2) The Chairman will include with the agenda for each plenary session and each committee meeting a statement calling to the attention of each participant in such session or meeting the requirements of this section, and requiring each non-Government member to provide the information described in paragraph (a)(1), which information shall be maintained by the Chairman as confidential and not disclosed to the public. Except as provided in this paragraph (a) or paragraph (b), members may vote or participate in matters before the Conference to the extent permitted by these by-laws without additional disclosure of interest.

(b) Disqualifications

(1) It shall be the responsibility of each member to bring to the attention of the Chairman, in advance of participation in any matter involving the Conference and as promptly as practicable, any situation that may require disqualification under 18 U.S.C. § 208. Absent a duly authorized waiver of or exemption from the requirements of that provision of law, such member may not participate in any matter that requires disqualification.

(2) No member may vote or otherwise participate in that capacity with respect to any proposed recommendation in connection with any study as to which he or she has been engaged as a consultant or contractor by the Conference.

(c) Applicability to Senior Fellows, Special Counsel, and Liaison Representatives

This section shall apply to senior fellows, special counsel, and liaison representatives as if they were members.

§ 302.6 General

(a) Meetings

In the case of meetings of the Council and plenary sessions of the Assembly, the Chairman (and, in the case of committee meetings, the committee chairman) shall have authority in his or her discretion to permit attendance by telephone or videoconference. All sessions of the Assembly and all committee meetings shall be open to the public. Privileges of the floor, however, extend only to members of the Conference, to senior fellows, to special counsel, and to liaison representatives (and to consultants and staff members insofar as matters on which they have been engaged are under consideration), and to persons who, prior to the commencement of the session or meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly (or, in the case of committee meetings, the approval of the chairman of the committee and unanimous consent of the committee).

(b) Quorums

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council. Action by the Council may be effected either by meeting or by individual vote, recorded either in writing or by electronic means.

(c) Proposed Amendments at Plenary Sessions

Any amendment to a committee-proposed recommendation that a member wishes to move at a plenary session should be submitted in writing in advance of that session by the date established by the Chairman. Any such pre-submitted amendment, if supported by a proper

motion at the plenary session, shall be considered before any amendments that were not pre-submitted. An amendment to an amendment shall not be subject to this rule.

(d) Separate Statements

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation. A member's failure to file or join in such a separate statement does not necessarily indicate his or her agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Executive Director not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

(e) Amendment of Bylaws

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(f) Procedure

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Meeting Policies and Procedures

(Updated December 2, 2020)

Note: Modified policies may be used during the COVID-19 pandemic, during which ACUS meetings are being held remotely.

The Administrative Conference of the United States (the "Conference") adheres to the following policies and procedures regarding the operation and security of committee meetings and plenary sessions open to the public.

Public Notice of Plenary Sessions and Committee Meetings

The Administrative Conference will publish notice of its plenary sessions in the *Federal Register* and on the Conference's website, www.acus.gov. Notice of committee meetings will be posted only on the Conference website. Barring exceptional circumstances, such notices will be published 15 calendar days before the meeting in question. Members of the public can also sign up to receive meeting alerts at acus.gov/subscribe.

Public Access to Meetings

Members of the public who wish to attend a committee meeting or plenary session in person or remotely should RSVP online at www.acus.gov no later than two business days before the meeting. To RSVP for a meeting, go to the Calendar on ACUS's website, click the event you would like to attend, and click the "RSVP" button. ACUS will reach out to members of the public who have RSVP'd if the meeting space cannot accommodate all who wish to attend in person.

Members of the public who wish to attend a meeting held at ACUS headquarters should first check in with security at the South Lobby entrance of Lafayette Centre, accessible from 20th Street and 21st Street NW. Members of the public who wish to attend an ACUS-sponsored meeting held at another facility should follow that facility's access procedures.

The Conference will make reasonable efforts to provide interested members of the public remote access to all committee meetings and plenary sessions and to provide access on its website to archived video of committee meetings and plenary sessions. The Conference will make reasonable efforts to post remote access information or instructions for obtaining remote access information on its website no later than four calendar days before a meeting. The *Federal Register* notice for each plenary session will also include remote access information or instructions for obtaining remote access information.

Participation in Meetings

The 101 statutory members of the Conference as well as liaison representatives, special counsels, and senior fellows may speak at plenary sessions and committee meetings. Voting at plenary sessions is limited to the 101 statutory members of the Conference. Statutory members may also vote in their respective committees. Liaison representatives, special counsels, and senior fellow may vote in their respective committees at the discretion of the Committee Chair.

The Conference Chair, or the Committee Chair at committee meetings, may permit a member of the public to speak with the unanimous approval of all present voting members. The Conference expects that every public attendee will be respectful of the Conference's staff, members, and others in attendance. A public attendee will be considered disruptive if he or she speaks without permission, refuses to stop speaking when asked by the Chair, acts in a belligerent manner, or threatens or appears to pose a threat to other attendees or Conference staff. Disruptive persons may be asked to leave and are subject to removal.

Written Public Comments

To facilitate public participation in committee and plenary session deliberations, the Conference typically invites members of the public to submit comments on the report(s) or recommendation(s) that it will consider at an upcoming committee meeting or plenary session.

Comments can be submitted online by clicking the "Submit a comment" button on the webpage for the project or event. Comments that cannot be submitted online can be mailed to the Conference at 1120 20th Street NW, Suite 706 South, Washington, DC 20036.

Members of the public should make sure that the Conference receives comments before the date specified in the meeting notice to ensure proper consideration.

Disability or Special Needs Accommodations

The Conference will make reasonable efforts to accommodate persons with physical disabilities or special needs. If you need special accommodations due to a disability, you should contact the Staff Counsel listed on the webpage for the event or the person listed in the *Federal Register* notice no later than seven business days before the meeting.

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Clarifying Statutory Access to Judicial Review of Agency Action

Committee on Judicial Review

Proposed Recommendation | June 17, 2021

Judicial review of federal administrative action is governed by numerous statutes,[1] including two general statutes, the Administrative Procedure Act (APA) and the Hobbs Act,[2] and hundreds of agency-specific statutes. The APA's judicial review provisions govern judicial review of agency action generally and provide default rules that apply in the absence of any more specifically applicable rules.[3] Agency-specific statutes (referred to herein as "specific judicial review statutes") govern judicial review of actions of particular agencies (often, of particular actions of particular agencies) and may provide specifically applicable rules that displace the general provisions of the APA.[4] Certain procedural aspects of judicial review are governed by federal court rules that specify how to file a petition for review, the content of the record on review, and other matters.[5]

The Administrative Conference of the United States undertook an initiative to identify and review all statutory provisions in the *United States Code* governing judicial review of federal agency rules and adjudicative orders.[6] In the course of this initiative, the Conference observed

[1] Judicial review is also governed by judicially developed doctrines. *See generally* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).

[2] 28 U.S.C. §§ 2341–2351.

[3] 5 U.S.C. §§ 701–706.

[4] See 5 U.S.C. § 559, which provides that a "[s]ubsequent statute may not be held to supersede or modify . . . chapter 7 [of the APA] . . . except to the extent that it does so expressly."

[5] *See* FED. R. APP. P. 15–20.

[6] *See* JONATHAN R. SIEGEL, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES (draft Mar. 17, 2021).

various ways in which some of these statutes create unnecessary obstacles to judicial review or overly complicate the process of judicial review. The Conference recommends eliminating these obstacles and complications in order to promote efficiency and fairness and to reduce unnecessary litigation.[7]

This Recommendation is divided into two sections. The first section (Recommendations 1–3) recommends a set of drafting principles for Congress when it writes new or amended specific judicial review statutes. The second section (Recommendation 4) recommends the passage of a general judicial review statute (referred to below as "the general statute") that would cure problems in existing judicial review statutes. The specific topics covered in the Recommendations are described below.

Specifying the Time Within Which to Seek Review

Judicial review statutes typically specify the time within which a party may seek judicial review. The Conference's review revealed two problems that some such statutes cause. First, some specific judicial review statutes specify the time limit using an unusual formulation that results in a time period one day shorter than might be expected. In cases involving these statutes, some parties have lost their right to review because they sought review one day late. Such denials of review serve no substantial policy interest.[8] Accordingly, Recommendation 1 provides that Congress, when specifying the time within which to seek judicial review of agency action,

[7] This Recommendation is not intended to address all issues related to access to judicial review. For example, it does not address the time of accrual of a right of action under the general statute of limitations in 28 U.S.C. § 2401(a) (*see, e.g.*, Wind River Mining Corp. v. United States, 946 F.2d 710 (9th Cir. 1991)); the extent to which judicial review remains available after the expiration of a time period specified in a special statute authorizing pre-enforcement review of agency rules (*see, e.g.*, PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051 (2019)); the application of judge-made issue-exhaustion requirements in curtailing judicial review (*see, e.g.*, Carr v. Saul, 141 S. Ct. 1352 (2021)); or whether Congress should specify where judicial review should be sought with regard to agency actions that are not currently the subject of any specific judicial review statute (*see* 5 U.S.C. § 703 (providing that review of such actions may be sought using "any applicable form of legal action . . . in a court of competent jurisdiction")). The Conference has addressed some of these issues in past recommendations. *See, e.g.*, Admin. Conf. of the U.S., Recommendation 82-7, *Judicial Review of Rules in Enforcement Proceedings*, 47 Fed. Reg. 58208 (Dec. 30, 1982); Admin. Conf. of the U.S., Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action*, 40 Fed. Reg. 27926 (July 2, 1975).

[8] SIEGEL, *supra* note 6, at 24–28.

should use one of the usual forms of words and avoid the unusual forms.[9] Recommendation 4(a) provides that Congress should include in the recommended general judicial review statute a provision that would add one day to the review period whenever a specific judicial review statute uses one of the unusual forms, thus saving certain cases from dismissal.

The other problem relating to time limits is that some specific judicial review statutes do not clearly specify the event that starts the time within which to seek review. In particular, some specific judicial review statutes provide that the time for seeking review of an agency rule begins when the rule is "issued" or "prescribed," which has led to litigation about exactly what event constitutes the "issu[ance]" of a rule.[10] Recommendation 2 provides as a general matter that Congress should clearly specify what event starts the time for seeking review of agency action. Recommendation 2 also provides that in drafting specific judicial review statutes providing for review of an agency rule, Congress should provide that the time for review runs from the rule's publication in the *Federal Register*. Recommendation 4(b) provides that Congress should include in the general statute a provision that whenever a time period for seeking judicial review begins upon the issuance of a rule, the time starts when the rule is published in the *Federal Register*.[11]

Specifying the Name and Content of the Document by Which Review is Sought

When review is to be sought in a court of appeals, most specific judicial review statutes provide that review should be sought by filing either a "petition for review" or a "notice of appeal." The term "petition for review" is more appropriate, as the term "appeal" suggests an appellate court's review of a decision by a lower court.[12] Recommendation 3 therefore provides that specific judicial review statutes should direct parties to seek review in a court of appeals by

[9] The recommended forms conform to those recommended by the drafting manuals of each house of Congress. *See* U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE 57 (1995); U.S. SENATE, OFFICE OF THE LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL 81–82 (1997).

[10] *Id.* at 28–29.

[11] If the relevant judicial review statute is silent with regard to computing or extending the time within which to seek review, the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure apply. *See* FED. R. CIV. P. 6; FED. R. APP. P. 26.

[12] SIEGEL, *supra* note 6, at 34–36.

filing a petition for review. Problems sometimes arise when a party incorrectly titles the document. In most such cases, the reviewing court treats the incorrect form as the correct one, but occasional decisions refuse to save a party who has given the document the wrong name. Parties should not lose their right to review by filing an incorrectly styled document.[13] Recommendation 4(c) proposes to solve this problem consistent with the Recommendation's preference for "petitions for review" in courts of appeals.

Recommendation 3 also provides that when review is to be sought in district court, Congress should provide that it be initiated by filing a complaint. District court litigators are accustomed to initiating proceedings with a complaint, and courts are also accustomed to this terminology because the Federal Rules of Civil Procedure contemplate the initiation of an action with the filing of a complaint.[14] Statutes calling for review to be initiated in district court by filing some other document, such as a petition for review or notice of appeal, might be confusing. Recommendation 4(d) proposes a cure for this problem that is consistent with the Recommendation's preference for "complaints" in district courts.

Most specific judicial review statutes do not prescribe the content of the document used to initiate review. This salutary practice allows the content of the document to be determined by rules of court, such as Federal Rule of Appellate Procedure 15, which contains only minimal requirements. A few unusual specific judicial review statutes prescribe the content of the petition for review in more detail. These requirements unnecessarily complicate judicial review.[15] Recommendation 3 reminds Congress that specific judicial review statutes need not specify the required content of a petition for review and that Congress may allow the content to be governed by the applicable rules of court. Recommendation 4(e) provides that Congress should include in the general statute a provision generally allowing documents initiating judicial review to comply either with an applicable specific judicial review statute or an applicable rule of court.

[13] *Id.*

[14] FED. R. CIV. P. 3.

[15] SIEGEL, *supra* note 6, at 36–37.

Jurisdiction to Hear the Case

The Conference's review uncovered another potential difficulty. Some specific judicial review statutes provide that parties should seek review of agency action in federal courts of appeals but do not specify that these courts will have jurisdiction to hear the resulting cases. In such a case, a court of appeals might question whether it has jurisdiction to consider the petition for review.[16] Accordingly, Recommendation 4(f) provides that Congress should include in the general statute a provision that whenever a specific judicial review statute authorizes a party to seek judicial review of agency action in a specified court, the court will have jurisdiction to consider the resulting case.

Simultaneous Service Requirements

Another potential problem is that some specific judicial review statutes provide that the party seeking judicial review of agency action must transmit the document initiating review to the agency "simultaneously" with filing the document. Such a provision could cause a court to question what should happen if a party seeking review serves the document initiating review on the agency, but not "simultaneously" with filing the document. Although the Conference's review has found no cases dismissed due to such circumstances, the Conference is concerned that a court might read the statutory text as requiring it to dismiss a petition for review based on the lack of simultaneous service.[17] Recommendation 4(g) therefore provides that whenever a specific judicial review statute requires a party seeking judicial review to serve a copy of the document initiating review on the agency involved "simultaneously" with filing it, the service requirement is satisfied if the document is served on the agency within the number of days specified in the recommended general statute.

[16] *Id*. at 32–34.

[17] *Id*. at 37–41.

Race to the Courthouse, Revisited

The Conference's Recommendation 80-5 addressed the "race to the courthouse" problem that arises when multiple parties seek judicial review of the same agency action in different circuits.[18] In accordance with that recommendation, Congress provided by statute that in such cases a lottery will determine which circuit will review the agency's action. The statute, however, provides that the lottery system applies only when an agency receives multiple petitions for review "from the persons instituting the proceedings."[19] This provision has been held not to apply to petitions for review forwarded to an agency by a court clerk, as some specific judicial review statutes require. Parties invoking judicial review under such specific judicial review statutes should be entitled to the benefit of the lottery system.[20] Recommendation 4(h) provides that Congress should amend the "race to the courthouse" statute appropriately.

RECOMMENDATION

Recommendations to Congress When Drafting Judicial Review Provisions

1. When specifying the time within which a party may seek judicial review of agency action, Congress should provide that a party may seek review "within" or "not later than" a specified number of days after an agency action. Congress should avoid providing that a party may seek review "prior to" or "before" the day that is a specified number of days after an agency action, or "within" or "before the expiration of" a period of a specified

[18] Admin. Conf. of the U.S., Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*, 45 Fed. Reg. 84954 (Dec. 24, 1980).

[19] 28 U.S.C. § 2112(a)(1).

[20] SIEGEL, *supra* note 6, at 38–41.

number of days beginning on the date of an agency's action. Examples of the recommended forms are:

a. "A party desiring judicial review may file a petition for review within 30 days after" the agency's action.
b. "A party desiring judicial review may file a petition for review not later than 30 days after" the agency's action.

Examples of the forms to be avoided are:

c. "A party desiring judicial review may file a petition for review prior to [or "before"] the 30th day after" the agency's action.
d. "A party desiring judicial review may file a petition for review within [or "before the expiration of"] the 30-day period beginning on the date of" the agency's action.

2. Congress should clearly specify what event starts the time for seeking review. Where the event is the promulgation, amendment, or repeal of a rule, Congress should provide that the event date is the date of the publication of the rule in the *Federal Register*.
3. When drafting a statute providing for review in a court of appeals, Congress should provide that review should be initiated by filing a petition for review. When drafting a statute providing for review in a district court, Congress should provide that review should be initiated by filing a complaint. With regard to either kind of statute, Congress should be aware that it need not specify the required content of the document initiating judicial proceedings because that matter would be governed by the applicable court rules.

General Judicial Review Statute

4. Congress should enact a new general judicial review statute that includes these provisions:
    a. Whenever a specific judicial review statute provides that a party may seek judicial review of an agency's action "prior to" or "before" the day that is a specified number of days after an agency's action, or "within" or "before the expiration of"

a period of a specific number of days beginning on the date of an agency's action, review may also be sought exactly that number of days after the agency's action.

b. Whenever a specific judicial review statute provides that the event that starts the time for seeking judicial review is the promulgation, amendment, or repeal of a rule, the event date shall be the date of the publication of the rule in the *Federal Register*.

c. Statutes authorizing judicial review in a court of appeals by the filing of a notice of appeal will be construed as authorizing judicial review by the filing of a petition for review, and whenever a party seeking judicial review in a court of appeals styles the document initiating review as a notice of appeal, the court will treat that document as a petition for review.

d. Statutes authorizing judicial review in a district court by the filing of a notice of appeal, petition for review, or other petition will be construed as authorizing judicial review by the filing of a complaint, and whenever a party seeking judicial review in a district court styles the document initiating review as a notice of appeal, petition for review, or other petition, the court will treat that document as a complaint.

e. Whenever a specific judicial review statute specifies the required content of a document that initiates judicial review, a party may initiate review with a document that complies with the requirements of that statute or a document that complies with the applicable rules of court.

f. Whenever a specific judicial review statute provides that a party may seek judicial review of an agency action in a specified federal court, the specified federal court will have jurisdiction to hear the resulting case.

g. Whenever a specific judicial review statute requires that a party seeking review serve the document initiating review on the agency that issued the order of which review is sought "simultaneously" with filing the document, this requirement is satisfied if the document is served on the agency within a reasonable but specific number of days, such as [seven/fourteen] days.

h. Congress should amend 28 U.S.C. § 2112(a)(1) by striking the phrase ", from the persons instituting the proceedings, the" and inserting "a" in its place, in both places where the phrase occurs.

Recommendation 4(h): Struck-Through Text of § 2112(a)(1) for Clarity:

(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives~~, from the persons instituting the proceedings, the~~ **[a]** petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives~~, from the persons instituting the proceedings, the~~ **[a]** petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

Commented [A1]: Note to Assembly: For Recommendation 4(h), this stricken text is provided for clarity and convenience. It is not included in line numbering and will not appear in the final recommendation.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Clarifying Statutory Access to Judicial Review of Agency Action

Committee on Judicial Review

Proposed Recommendation | June 17, 2021

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

Judicial review of federal administrative action is governed by numerous statutes,[1] including two general statutes, the Administrative Procedure Act (APA)[2] and the Hobbs Act,[3] and hundreds of agency-specific statutes. Judicial review is also governed by judicially developed doctrines.[4] The APA's judicial review provisions govern judicial review of agency action generally and provide default rules that apply in the absence of any more specifically applicable rules.[5] Agency-specific statutes (referred to herein as "specific judicial review statutes") govern judicial review of actions of particular agencies (often, of particular actions of particular agencies) and may provide specifically applicable rules that displace the general provisions of the APA.[6] Certain procedural aspects of judicial review are governed by federal

Commented [CMA1]: Proposed Amendment from Senior Fellow Alan B. Morrison

[1] ~~Judicial review is also governed by judicially developed doctrines. *See generally* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).~~

[2] 5 U.S.C. §§ 701–06.

[3] 28 U.S.C. §§ 2341–~~23~~51.

[4] *See generally* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).

[5] ~~5 U.S.C. §§ 701–706.~~

[6] See 5 U.S.C. § 559, which provides that a "[s]ubsequent statute may not be held to supersede or modify . . . chapter 7 [of the APA] . . . except to the extent that it does so expressly."

court rules that specify how to file a petition for review, the content of the record on review, and other matters.[7]

The Administrative Conference of the United States undertook an initiative to identify and review all statutory provisions in the *United States Code* governing judicial review of federal agency rules and adjudicative orders.[8] In the course of this initiative, the Conference observed various ways in which some of these statutes create unnecessary obstacles to judicial review or overly complicate the process of judicial review. The Conference recommends eliminating these obstacles and complications in order to promote efficiency and fairness and to reduce unnecessary litigation.[9]

This Recommendation is divided into two sections. The first section (~~Recommendations~~ Paragraphs 1–3) recommends a set of drafting principles for Congress when it writes ~~new or amended~~or amends specific judicial review statutes. The second section (~~Recommendation~~ Paragraphs 4 and 5) recommends the preparation and passage of a general judicial review statute (referred to below as "the general statute") that would cure problems in existing judicial review statutes. The Conference's Office of the Chairman has announced that it will prepare and submit

[7] *See* FED. R. APP. P. 15–20.

[8] *See* JONATHAN R. SIEGEL, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES (draft May ~~17~~28, 2021).

[9] This Recommendation is not intended to address all issues related to access to judicial review. For example, it does not address the time of accrual of a right of action under the general statute of limitations in 28 U.S.C. § 2401(a) (*see, e.g.*, Wind River Mining Corp. v. United States, 946 F.2d 710 (9th Cir. 1991)); the extent to which judicial review remains available after the expiration of a time period specified in a special statute authorizing pre-enforcement review of agency rules (*see, e.g.*, PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051 (2019)); the application of judge-made issue-exhaustion requirements in curtailing judicial review (*see, e.g.*, Carr v. Saul, 141 S. Ct. 1352 (2021)); or whether Congress should specify where judicial review should be sought with regard to agency actions that are not currently the subject of any specific judicial review statute (*see* 5 U.S.C. § 703 (providing that review of such actions may be sought using "any applicable form of legal action . . . in a court of competent jurisdiction")). The Conference has addressed some of these issues in past recommendations. *See, e.g.*, Admin. Conf. of the U.S., Recommendation 82-7, *Judicial Review of Rules in Enforcement Proceedings*, 47 Fed. Reg. 58208 (Dec. 30, 1982); Admin. Conf. of the U.S., Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action*, 40 Fed. Reg. 27926 (July 2, 1975).

to Congress a proposed statute for consideration that would provide for the statutory changes in Paragraph 4. The specific topics covered in the Recommendation~~s~~ are described below.

Commented [CA2]: Proposed Amendment from Council (see parallel amendment at lines 175–177 below)

Specifying the Time Within Which to Seek Review

Judicial review statutes typically specify the time within which a party may seek judicial review. The Conference's review revealed two problems that some such statutes cause. First, some specific judicial review statutes specify the time limit using an unusual formulation that results in a time period one day shorter than might be expected. In cases involving these statutes, some parties have lost their right to review because they sought review one day late. Such denials of review serve no substantial policy interest.[10] Accordingly, ~~Recommendation~~ Paragraph 1 provides that Congress, when specifying the time within which to seek judicial review of agency action, should use one of the usual forms of words and avoid the unusual forms.[11] ~~Recommendation~~Paragraph 4(a) provides that Congress should include in the recommended general judicial review statute a provision that would add one day to the review period whenever a specific judicial review statute uses one of the unusual forms, thus saving certain cases from dismissal.

The other problem relating to time limits is that some specific judicial review statutes do not clearly ~~specify~~ identify the event that starts the time within which to seek review. In particular, some specific judicial review statutes provide that the time for seeking review of an agency rule begins when the rule is "issued" or "prescribed," which has led to litigation about exactly what event constitutes the "issu[ance]" of a rule.[12] ~~Recommendation~~Paragraph 2 provides as a general matter that Congress should clearly specify what event starts the time for seeking review of agency action. ~~Recommendation~~ Paragraph 2 also provides that in drafting specific

[10] SIEGEL, *supra* note ~~68~~, at ~~24–28~~26–30.

[11] The recommended forms conform to those recommended by the drafting manuals of each house of Congress. *See* U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE 57 (1995); U.S. SENATE, OFFICE OF THE LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL 81–82 (1997).

[12] SIEGEL, *supra* note 8, ~~*Id.*~~ at ~~28–29~~31–32.

judicial review statutes providing for review of an agency rule, Congress should provide that the time for review runs from the rule's publication in the *Federal Register*. ~~Recommendation~~ Paragraph 4(b) provides that Congress should include in the general statute a provision that whenever a time period for seeking judicial review begins upon the issuance of a rule, the time starts when the rule is published in the *Federal Register*.[13]

Specifying the Name and Content of the Document by Which Review is Sought

When review is to be sought in a court of appeals, most specific judicial review statutes provide that review should be sought by filing either a "petition for review" or a "notice of appeal." The term "petition for review" is more appropriate, as the term "appeal" suggests an appellate court's review of a decision by a lower court.[14] ~~Recommendation~~Paragraph 3 therefore provides that specific judicial review statutes should direct parties to seek review in a court of appeals by filing a petition for review. Problems sometimes arise when a party incorrectly titles the document. In most such cases, the reviewing court treats the incorrect form as the correct one, but occasional decisions refuse to save a party who has given the document the wrong name. Parties should not lose their right to review by filing an incorrectly styled document.[15] ~~Recommendation~~Paragraph 4(c) proposes to solve this problem consistent with ~~the~~ ~~Recommendation~~Paragraph 3's preference for "petitions for review" in courts of appeals.

~~Recommendation~~Paragraph 3 also provides that when review is to be sought in district court, Congress should provide that it be initiated by filing a complaint. District court litigators are accustomed to initiating proceedings with a complaint, and courts are also accustomed to this terminology because the Federal Rules of Civil Procedure contemplate the initiation of an action with the filing of a complaint.[16] Statutes calling for review to be initiated in district court by

[13] If the relevant judicial review statute is silent with regard to computing or extending the time within which to seek review, the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure apply. *See* FED. R. CIV. P. 6; FED. R. APP. P. 26.

[14] SIEGEL, *supra* note ~~68~~, at ~~34–36~~38–40; *see also* Garland v. Dai, 141 S. Ct. 1669 (2021).

[15] *Id*.

[16] FED. R. CIV. P. 3.

filing some other document, such as a petition for review or notice of appeal, might be confusing. ~~Recommendation~~Paragraph 4(d) proposes a cure for this problem that is consistent with the ~~Recommendation~~Paragraph 3's preference for "complaints" in district courts.

Most specific judicial review statutes do not prescribe the content of the document used to initiate review. This salutary practice allows the content of the document to be determined by rules of court, such as Federal Rule of Appellate Procedure 15, which contains only minimal requirements. A few unusual specific judicial review statutes prescribe the content of the petition for review in more detail. These requirements unnecessarily complicate judicial review.[17] ~~Recommendation~~Paragraph 3 reminds Congress that specific judicial review statutes need not specify the required content of a petition for review and that Congress may allow the content to be governed by the applicable rules of court. ~~Recommendation~~Paragraph 4(e) provides that Congress should include in the general statute a provision generally allowing documents initiating judicial review to comply either with an applicable specific judicial review statute or an applicable rule of court.

Jurisdiction to Hear the Case

The Conference's review uncovered another potential difficulty: ~~S~~some specific judicial review statutes provide that parties should seek review of agency action in federal courts of appeals but do not specify that these courts will have jurisdiction to hear the resulting cases. In such a case, a court of appeals might question whether it has jurisdiction to consider the petition for review.[18] Accordingly, ~~Recommendation~~Paragraph 4(f) provides that Congress should include in the general statute a provision that whenever a specific judicial review statute authorizes a party to seek judicial review of agency action in a specified court, the court will have jurisdiction to consider the resulting case.

[17] SIEGEL, *supra* note ~~68~~, at ~~36–37~~40–41.

[18] *Id.* at ~~32–34~~35–37.

Simultaneous Service Requirements

Another potential problem is that some specific judicial review statutes provide that the party seeking judicial review of agency action must transmit the document initiating review to the agency "simultaneously" with filing the document. Such a provision could cause a court to question what should happen if a party seeking review serves the document initiating review on the agency, but not "simultaneously" with filing the document. Although the Conference's review has found no cases dismissed due to such circumstances, the Conference is concerned that a court might read the statutory text as requiring it to dismiss a petition for review based on the lack of simultaneous service.[19] ~~Recommendation~~Paragraph 4(g) therefore provides that whenever a specific judicial review statute requires a party seeking judicial review to serve a copy of the document initiating review on the agency involved "simultaneously" with filing it, the service requirement is satisfied if the document is served on the agency within the number of days specified in the recommended general statute.

Race to the Courthouse, Revisited

The Conference's Recommendation 80-5 addressed the "race to the courthouse" problem that arises when multiple parties seek judicial review of the same agency action in different circuits.[20] In accordance with that recommendation, Congress provided by statute that in such cases a lottery will determine which circuit will review the agency's action. The statute, however, provides that the lottery system applies only when an agency receives multiple petitions for review "from the persons instituting the proceedings."[21] This provision has been held not to apply to petitions for review forwarded to an agency by a court clerk, as some specific judicial review statutes require. Parties invoking judicial review under such specific

[19] *Id*. at ~~37–41~~41–45.

[20] Admin. Conf. of the U.S., Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*, 45 Fed. Reg. 84954 (Dec. 24, 1980).

[21] 28 U.S.C. § 2112(a)(1).

judicial review statutes should be entitled to the benefit of the lottery system.[22] ~~Recommendation~~Paragraph 4(h) provides that Congress should amend the "race to the courthouse" statute appropriately.

RECOMMENDATION

Recommendations to Congress When Drafting Judicial Review Provisions

1. When specifying the time within which a party may seek judicial review of agency action, Congress should provide that a party may seek review "within" or "not later than" a specified number of days after an agency action. Congress should avoid providing that a party may seek review "prior to" or "before" the day that is a specified number of days after an agency action, or "within" or "before the expiration of" a period of a specified number of days beginning on the date of an agency's action. Examples of the recommended forms are:
    a. "A party ~~desiring~~seeking judicial review may file a petition for review within 30 days after" the agency's action.
    b. "A party ~~desiring~~seeking judicial review may file a petition for review not later than 30 days after" the agency's action.

    Examples of the forms to be avoided are:
    c. "A party ~~desiring~~seeking judicial review may file a petition for review prior to [or "before"] the 30th day after" the agency's action.
    d. "A party ~~desiring~~seeking judicial review may file a petition for review within [or "before the expiration of"] the 30-day period beginning on the date of" the agency's action.

[22] SIEGEL, *supra* note ~~68~~, at ~~38–41~~42–45.

2. Congress should clearly specify what event starts the time for seeking review. Where the event is the promulgation, amendment, or repeal of a rule, Congress should provide that the event date is the date of the publication of the rule in the *Federal Register*.
3. When drafting a statute providing for review in a court of appeals, Congress should provide that review should be initiated by filing a petition for review. When drafting a statute providing for review in a district court, Congress should provide that review should be initiated by filing a complaint. With regard to either kind of statute, Congress should be aware that it need not specify the required content of the document initiating judicial proceedings because that matter would be governed by the applicable court rules.

General Judicial Review Statute

4. Congress should enact a new general judicial review statute that includes these provisions:
    a. Whenever a specific judicial review statute provides that a party may seek judicial review of an agency's action "prior to" or "before" the day that is a specified number of days after an agency's action, or "within" or "before the expiration of" a period of a specific number of days beginning on the date of an agency's action, review may also be sought exactly that number of days after the agency's action.
    b. Whenever a specific judicial review statute provides that the event that starts the time for seeking judicial review is the promulgation, amendment, or repeal of a rule, the event date shall be the date of the publication of the rule in the *Federal Register*.
    c. Statutes authorizing judicial review in a court of appeals by the filing of a notice of appeal will be construed as authorizing judicial review by the filing of a petition for review, and whenever a party seeking judicial review in a court of appeals styles the document initiating review as a notice of appeal, the court will treat that document as a petition for review.
    d. Statutes authorizing judicial review in a district court by the filing of a notice of appeal, petition for review, or other petition will be construed as authorizing

judicial review by the filing of a complaint, and whenever a party seeking judicial review in a district court styles the document initiating review as a notice of appeal, petition for review, or other petition, the court will treat that document as a complaint.

e. Whenever a specific judicial review statute specifies the required content of a document that initiates judicial review, a party may initiate review with a document that complies with the requirements of that statute or a document that complies with the applicable rules of court.

f. Whenever a specific judicial review statute provides that a party may seek judicial review of an agency action in a specified federal court, the specified federal court will have jurisdiction to hear the resulting case.

g. Whenever a specific judicial review statute requires that a party seeking review serve the document initiating review on the agency that issued the order of which review is sought "simultaneously" with filing the document, this requirement is satisfied if the document is served on the agency within a reasonable but specific number of days, such as [seven/fourteen] days.

h. Congress should amend 28 U.S.C. § 2112(a)(1) by striking the phrase ", from the persons instituting the proceedings, the" and inserting "a" in its place, in both places where the phrase occurs.

5. The Conference's Office of the Chairman should prepare and submit to Congress a proposed general judicial review statute for consideration that would provide for the statutory changes in Paragraph 4.

Commented [CA3]: Proposed Amendment from Council (see parallel amendment at lines 21–26 above)

Paragraph 4(h): Struck-Through Text of § 2112(a)(1) for Clarity:

Commented [ACUS4]: Note to Assembly: For Paragraph 4(h), this stricken text is provided for clarity and convenience. It is not included in line numbering and will not appear in the final recommendation.

(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives~~, from the persons instituting the proceedings, the~~ **[a]** petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives~~, from the persons instituting the proceedings, the~~ **[a]** petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that

court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Managing Mass, Computer-Generated, and Malattributed Comments

Commented [A1]: The Committee on Rulemaking voted to replace the original title of this recommendation (*Mass, Computer-Generated, and Fraudulent Comments*).

Committee on Rulemaking

Proposed Recommendation | June 17, 2021

Under the Administrative Procedure Act (APA), agencies must give members of the public notice of proposed rules and the opportunity to offer their "data, views, or arguments" for the agencies' consideration.[1] For each proposed rule subject to these notice-and-comment procedures, agencies create and maintain an online public rulemaking docket in which they collect and publish the comments they receive as well as other publicly available information about the proposed rule.[2] Agencies must then process, read, and analyze the comments received. The APA requires agencies to consider the "relevant matter presented" in the comments received and to provide a "concise general statement of [the rule's] basis and purpose."[3] When a rule is challenged on judicial review, courts have required agencies to demonstrate that they have considered and responded to any comment that raises a significant issue.[4] The notice-and-

[1] 5 U.S.C. § 553. This requirement is subject to a number of exceptions. *See id.*

[2] *See* E-Government Act § 206, 44 U.S.C. § 3501 note (establishing the e-Rulemaking Program to create an online system for conducting the notice-and-comment process); *see also* Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41358 (July 10, 2013) (distinguishing between "the administrative record for judicial review," "rulemaking record," and the "public rulemaking docket").

[3] 5 U.S.C. § 553.

[4] Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment.").

comment process is an important opportunity for the public to provide input on a proposed rule and the agency to "avoid errors and make a more informed decision" on its rulemaking.[5]

Technological advances have expanded the public's access to agencies' online rulemaking dockets and made it easier for the public to comment on proposed rules in ways that the Administrative Conference has encouraged.[6] At the same time, in recent high-profile rulemakings, members of the public have submitted comments in new ways or at new scales that can challenge agencies' current approaches to processing these comments or managing their online rulemaking dockets.

Agencies have confronted three types of comments that present distinctive management challenges: (1) mass comments, (2) computer-generated comments, and (3) a type of fraudulent comment called a "malattributed comment." For the purposes of this Recommendation, mass comments are comments submitted in large volumes by members of the public, including the organized submission of identical or substantively identical comments. Computer-generated comments are comments whose substantive content has been generated by computer software rather than by humans.[7] Malattributed comments are comments falsely attributed to people who did not submit them.

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[5] Azar v. Allina Health Services, 139 S. Ct. 1804, 1816 (2019).

[6] *See* Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48791 (Aug. 9, 2011).

[7] The ability to automate the generation of comment content may also remove human interaction with the agency and facilitate the submission of large volumes of comments in cases in which software can repeatedly submit comments via Regulations.gov.

These three types of comments, which have been the subject of recent reports by both federal[8] and state[9] authorities, can raise challenges for agencies in processing, reading, and analyzing the comments they receive in some rulemakings. If not managed well, the processing of these comments can contribute to rulemaking delays or can raise other practical or legal concerns for agencies to consider.

In addressing the three types of comments in a single recommendation, the Conference does not mean to suggest that agencies should treat these comments in the same way. Rather, the Conference is addressing these comments in the same Recommendation because, despite their differences, they can present similar or even overlapping management concerns during the rulemaking process. In some cases, agencies may also confront all three types of comments in the same rulemaking.

The challenges presented by these three types of comments are by no means identical. With mass comments, agencies may encounter processing or cataloging challenges simply as a result of the volume as well as the identical or substantively identical content of some comments they receive. Without the requisite tools, agencies may also find it difficult or time-consuming to digest or analyze the overall content of all comments they receive.

In contrast with mass comments, computer-generated comments and malattributed comments may mislead an agency or raise issues under the APA and other statutes. One particular problem that agencies may encounter is distinguishing computer-generated comments from comments written by humans. Computer-generated comments may also raise potential

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[8] *See* PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, U.S. SENATE COMM. ON HOMELAND SECURITY AND GOV'T AFFAIRS, STAFF REPORT, ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS (2019); U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-413T, SELECTED AGENCIES SHOULD CLEARLY COMMUNICATE HOW THEY POST PUBLIC COMMENTS AND ASSOCIATED IDENTITY INFORMATION (2020); U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-483, SELECTED AGENCIES SHOULD CLEARLY COMMUNICATE PRACTICES ASSOCIATED WITH IDENTITY INFORMATION IN THE PUBLIC COMMENT PROCESS (2019).

[9] N.Y. STATE OFF. OF THE ATT'Y GEN LETITIA JAMES, FAKE COMMENTS: HOW U.S. COMPANIES & PARTISANS HACK DEMOCRACY TO UNDERMINE YOUR VOICE (2021).

issues for agencies as a result of the APA's provision for the submission of comments by "interested persons."[10] Malattributed comments can harm people whose identities are stolen and may create the possibility of prosecution under state or federal criminal law. Malattribution may also deceive agencies or diminish the informational value of a comment, especially when the commenter claims to have situational knowledge or the identity of the commenter is otherwise relevant. The informational value that both of these types of comments provide to agencies is likely to be limited or at least different from comments that have been neither computer-generated nor malattributed.

This Recommendation is limited to how agencies can better manage the processing challenges associated with mass, computer-generated, and malattributed comments.[11] By addressing these processing challenges, the Recommendation is not intended to imply that widespread participation in the rulemaking process, including via mass comments, is problematic. Indeed, the Conference has explicitly endorsed widespread public participation on multiple occasions,[12] and this Recommendation should help agencies cast a wide net when seeking input from all individuals and groups affected by a rule. The Recommendation aims to enhance agencies' ability to process comments they receive in the most efficient way possible and to ensure that the rulemaking process is transparent to prospective commenters and the public more broadly.

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[10] 5 U.S.C. § 553.

[11] This Recommendation does not address what role particular types of comments should play in agency decision making or what consideration, if any, agencies should give to the number of comments in support of a particular position.

[12] *See* Recommendation 2018-7, *supra* note 6; Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75117 (Dec. 17, 2014); Recommendation 2013-5, *supra* note 6; Recommendation 2011-8, *supra* note 6; Admin. Conf. of the U.S., Recommendation 2011-7, *Federal Advisory Committee Act: Issues and Proposed Reforms*, 77 Fed. Reg. 2261 (Jan. 17, 2012); Recommendation 2011-2, *supra* note 6.

Agencies can advance the goals of public participation by being transparent about their comment policies or practices and by providing educational information about public involvement in the rulemaking process.[13] Agencies' ability to process comments can also be enhanced by digital technologies. As part of its e-Rulemaking Program, for example, the General Services Administration (GSA) has implemented technologies on the Regulations.gov platform that make it easier for agencies to verify that a commenter is a human being.[14] GSA's Regulations.gov platform also includes an application programming interface (API)—a feature of a computer system that enables different systems to communicate with it—to facilitate mass comment submission.[15] This technology platform allows partner agencies to better manage comments from identifiable entities that submit large volumes of comments. Some federal agencies also use de-duplication software to identify and group identical or substantively identical comments.

New software and technologies will likely emerge in the future, and agencies will need to keep apprised of innovations in managing public comments. Agencies might also consider adopting innovations that augment the notice-and-comment process with alternative methods for encouraging public participation, particularly to the extent that doing so ameliorates some of the management challenges described above.[16] Because technology is rapidly changing, agencies

[13] For an example of educational information on rulemaking participation, see the "Commenter's Checklist" that the e-Rulemaking Program currently displays in a pop-up window for every rulemaking webpage that offers the public the opportunity to comment. *See Commenter's Checklist*, GEN. SERVS. ADMINISTRATION, https://www.Regulations.gov (last visited May 24, 2021) (navigate to any rulemaking with an open comment period; click comment button; then click "Commenter's Checklist"). In addition, the text of this checklist appears on the project page for this Recommendation on the ACUS website.

[14] This software is distinct from identity validation technologies that force commenters to prove their identities.

[15] *See Regulations.gov API*, GEN. SERVS. ADMINISTRATION, https://open.gsa.gov/api/regulationsgov/ (last visited May 24, 2021).

[16] *See* Steve Balla, Reeve Bull, Bridget Dooling, Emily Hammond, Michael Herz, Michael Livermore, & Beth Simone Noveck, Mass, Computer-Generated, and Fraudulent Comments 43–48 (Apr. 2, 2021) (draft report to the Admin. Conf. of the U.S.).

will need to stay apprised of new developments that could enhance public participation in rulemaking.

Not all agencies will encounter mass, computer-generated, or malattributed comments. But some agencies have confronted all three, sometimes in the same rulemaking. In offering the best practices that follow, the Conference recognizes that agency needs and resources will vary. For this reason, agencies should tailor the best practices in this Recommendation to their particular rulemaking programs and the types of comments they receive or expect to receive.

RECOMMENDATION

Managing Mass Comments

1. The e-Rulemaking Program that the General Services Administration (GSA) administers should provide a common de-duplication tool for agencies to use, although GSA should allow agencies to modify the de-duplication tool to fit their needs or to use another tool, as appropriate. When agencies find it helpful to use other software tools to perform de-duplication or extract information from a large number of comments, they should use reliable and appropriate software. Such software should provide agencies with enhanced search options to identify the unique content of comments, such as the technologies used by commercial legal databases like Westlaw or LexisNexis.
2. To enable easier public navigation through online rulemaking dockets, agencies may welcome any person or entity organizing mass comments to submit comments with multiple signatures rather than separate identical or substantively identical comments. Alternatively, agencies may wish to consider approaches to managing the display of comments online, such as by posting only a single representative example of identical comments in the online rulemaking docket or by breaking out and posting only non-identical content in the docket, taking into consideration the importance to members of the public to be able to verify that their comments were received and placed in the agency record. When agencies decide not to display all identical comments online, they should

be transparent about their actions and the existence of any process for verifying the receipt of individual comments or locating identical comments in the docket.

3. When an agency decides not to include all identical or substantively identical comments in its online rulemaking docket to improve the navigability of the docket, it should ensure that any reported total number of comments (such as in Regulations.gov or in the preambles to final rules) accounts for the number of identical or substantively identical comments. If resources permit, agencies should also consider providing an opportunity for interested members of the public to obtain or access all comments received.

Managing Computer-Generated Comments

4. If an agency identifies a comment as computer-generated, it may disregard the comment unless the agency identifies it as having informational value.
5. To the extent feasible, agencies should flag any comments they have identified as computer-generated or display or store them separately from other comments. If an agency flags a comment as computer-generated, or displays or stores it separately from the online rulemaking docket, the agency should note its action in the docket. The agency may also choose to notify the submitter directly if doing so does not violate any relevant policy prohibiting direct contact with senders of "spam" or similar communications.
6. Agencies that operate their own commenting platforms should consider using technology that verifies that a commenter is a human being, such as reCAPTCHA or another similar identity proofing tool. The e-Rulemaking Program should continue to retain this functionality.
7. If an agency relies on a comment the agency knows to be computer-generated, it should include that comment in its online rulemaking docket. When publishing a final rule, agencies should note any comments on which they rely that are computer-generated and state whether they removed from the docket any comments they identified as computer-

generated.

Managing Malattributed Comments

8. Agencies should provide opportunities (including after the comment deadline) for individuals whose names or identifying information have been attached to comments they did not submit to identify such comments and to request that the comment be anonymized or removed from the online rulemaking docket.
9. If an agency flags a comment as malattributed or removes such a comment from the online rulemaking docket, it should note its action in the docket. Agencies may also choose to notify the purported submitter directly if doing so does not violate any agency policy.
10. If an agency relies on a comment it knows is malattributed, it should include an anonymized version of that comment in its online rulemaking docket. When publishing a final rule, agencies should note any comments on which they rely that are malattributed and should state whether they removed from the docket any malattributed comments.

Enhancing Agency Transparency in the Comment Process

11. Agencies should inform the public about their policies concerning the posting and use of mass, computer-generated, and malattributed comments. These policies should take into account the meaningfulness of the public's opportunity to participate in the rulemaking process and should balance goals such as user-friendliness, transparency, and informational completeness. In their policies, agencies may provide for exceptions in appropriate circumstances.
12. Agencies and relevant coordinating bodies (such as GSA's e-Rulemaking Program, the Office of Information and Regulatory Affairs, and any other governmental bodies or informal working groups that address common rulemaking issues) should consider providing publicly available materials that explain to prospective commenters what types of responses they anticipate would be most useful, while also welcoming any other

comments that members of the public wish to submit and remaining open to learning from them. These materials could be presented in various formats—such as videos or FAQs—to reach different audiences. These materials may also include statements within the notice of proposed rulemaking for a given agency rule or on agencies' websites to explain the purpose of the comment process and explain that agencies seriously consider any relevant public comment from a person or organization.

13. To encourage the most relevant submissions, agencies that have specific questions or are aware of specific information that may be useful should identify those questions or such information in their notices of proposed rulemaking.

Additional Opportunities for Public Participation

14. Agencies and relevant coordinating bodies should stay abreast of new technologies for facilitating informative public participation in rulemakings. These technologies may help agencies to process mass comments or identify and process computer-generated and malattributed comments. In addition, new technologies may offer new opportunities to engage the public, both as part of or as a supplement to the notice-and-comment process. Such opportunities may help ensure that agencies receive input from communities that may not otherwise have an opportunity to participate in the conventional comment process.

Coordination and Training

15. Agencies should work closely with relevant coordinating bodies to improve existing technologies and develop new technologies to address issues associated with mass, computer-generated, and malattributed comments. Agencies and relevant coordinating bodies should share best practices and relevant innovations for addressing challenges related to these comments.
16. Agencies should develop and offer opportunities for ongoing training and staff development to respond to the rapidly evolving nature of technologies related to mass,

computer-generated, and malattributed comments and to public participation more generally.

17. As authorized by 5 U.S.C. § 594(2), the Conference's Office of the Chairman should provide for the "interchange among administrative agencies of information potentially useful in improving" agency comment processing systems. The subjects of interchange might include technological and procedural innovations, common management challenges, and legal concerns under the APA and other relevant statutes.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Mass, Computer-Generated, and Fraudulent Comments

Commented [A1]: The Committee on Rulemaking voted to replace the original title of this recommendation with *Managing Mass, Computer-Generated, and Malattributed Comments*.

The Council proposes changing the Committee's proposed title to *Managing Mass, Computer-Generated, and* ***Falsely Attributed*** *Comments*.

The Council agrees with the Committee that the proposed title better reflects the objectives of the recommendation, and it shares the Committee's concern with the word "fraudulent." The Council proposes one modification to the proposed title—namely, substituting "falsely attributed" for "malattributed" both in the title and wherever else it appears in the document—for the following reasons: First, the Recommendation already defines "malattributed" to mean "falsely attributed" (line 26). There is no reason to introduce another term. Second, while "malattributed" is used in some academic literature (including Professor Herz's excellent article), it is not the commonly used term by agencies, Congress, and the public. It is important that ACUS titles its recommendation so that their subjects are immediately understood by the intended audience. (No other governmental bodies that have addressed the subject—including GAO, the NY Attorney General, and the U.S. Senate Permanent Subcommittee on Investigations—have used the word "malattributed.") And third, "malattributed" is not a word. The Council prefers common English words.

See also conforming changes to paragraph beginning at line 19 and to all subsequent instances of the term "malattributed" or "malattribution."

Committee on Rulemaking

Proposed Recommendation | June 17, 2021

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from Council and Conference members (with sources shown in the margin).

Under the Administrative Procedure Act (APA), agencies must give members of the public notice of proposed rules and the opportunity to offer their "data, views, or arguments" for the agencies' consideration.[1] For each proposed rule subject to these notice-and-comment procedures, agencies create and maintain an online public rulemaking docket in which they collect and publish the comments they receive as well as other publicly available information about the proposed rule.[2] Agencies must then process, read, and analyze the comments received. The APA requires agencies to consider the "relevant matter presented" in the comments received and to provide a "concise general statement of [the rule's] basis and purpose."[3] When a rule is challenged on judicial review, courts have required agencies to demonstrate that they have considered and responded to any comment that raises a significant issue.[4] The notice-and-

[1] 5 U.S.C. § 553. This requirement is subject to a number of exceptions. *See id.*

[2] *See* E-Government Act § 206, 44 U.S.C. § 3501 note (establishing the e-Rulemaking Program to create an online system for conducting the notice-and-comment process); *see also* Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41358 (July 10, 2013) (distinguishing between "the administrative record for judicial review," "rulemaking record," and the "public rulemaking docket").

[3] 5 U.S.C. § 553.

[4] Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment.").

comment process is an important opportunity for the public to provide input on a proposed rule and the agency to "avoid errors and make a more informed decision" on its rulemaking.[5]

Technological advances have expanded the public's access to agencies' online rulemaking dockets and made it easier for the public to comment on proposed rules in ways that the Administrative Conference has encouraged.[6] At the same time, in recent high-profile rulemakings, members of the public have submitted comments in new ways or at new scales that can challenge agencies' current approaches to processing these comments or managing their online rulemaking dockets.

Agencies have confronted three types of comments that present distinctive management challenges: (1) mass comments, (2) computer-generated comments, and (3) ~~a type of fraudulent comment called a "malattributed comment."~~falsely attributed comments. For the purposes of this Recommendation, mass comments are comments submitted in large volumes by members of the public, including the organized submission of identical or substantively identical comments. Computer-generated comments are comments whose substantive content has been generated by computer software rather than by humans.[7] ~~Malattributed~~ Falsely attributed comments are comments falsely attributed to people who did not submit them.

Commented [CA2]: Proposed Amendment from Council # 1

See also comment on title. All subsequent instances of the term "malattributed" have been changed in redline to reflect this proposed amendment.

[5] Azar v. Allina Health Services, 139 S. Ct. 1804, 1816 (2019).

[6] *See* Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48791 (Aug. 9, 2011).

[7] The ability to automate the generation of comment content may also remove human interaction with the agency and facilitate the submission of large volumes of comments in cases in which software can repeatedly submit comments via Regulations.gov.

These three types of comments, which have been the subject of recent reports by both federal[8] and state[9] authorities, can raise challenges for agencies in processing, reading, and analyzing the comments they receive in some rulemakings. If not managed well, the processing of these comments can contribute to rulemaking delays or can raise other practical or legal concerns for agencies to consider.

In addressing the three types of comments in a single recommendation, the Conference does not mean to suggest that agencies should treat these comments in the same way. Rather, the Conference is addressing these comments in the same Recommendation because, despite their differences, they can present similar or even overlapping management concerns during the rulemaking process. In some cases, agencies may also confront all three types of comments in the same rulemaking.

The challenges presented by these three types of comments are by no means identical. With mass comments, agencies may encounter processing or cataloging challenges simply as a result of the volume as well as the identical or substantively identical content of some comments they receive. Without the requisite tools, agencies may also find it difficult or time-consuming to digest or analyze the overall content of all comments they receive.

In contrast with mass comments, computer-generated comments and ~~malattributed~~ falsely attributed comments may mislead an agency or raise issues under the APA and other statutes. One particular problem that agencies may encounter is distinguishing computer-generated comments from comments written by humans. Computer-generated comments may also raise

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[9] N.Y. STATE OFF. OF THE ATT'Y GEN LETITIA JAMES, FAKE COMMENTS: HOW U.S. COMPANIES & PARTISANS HACK DEMOCRACY TO UNDERMINE YOUR VOICE (2021).

potential issues for agencies as a result of the APA's provision for the submission of comments by "interested persons."[10] ~~Malattributed~~ Falsely attributed comments can harm people whose identities are ~~stolen~~ appropriated and may create the possibility of prosecution under state or federal criminal law. ~~Malattribution~~ False attribution may also deceive agencies or diminish the informational value of a comment, especially when the commenter claims to have situational knowledge or the identity of the commenter is otherwise relevant. The informational value that both of these types of comments provide to agencies is likely to be limited or at least different from comments that have been neither computer-generated nor ~~malattributed~~falsely attributed.

Commented [CA3]: Proposed Amendment from Council # 2

This Recommendation is limited to how agencies can better manage the processing challenges associated with mass, computer-generated, and ~~malattributed~~ falsely attributed comments.[11] By addressing these processing challenges, the Recommendation is not intended to imply that widespread participation in the rulemaking process, including via mass comments, is problematic. Indeed, the Conference has explicitly endorsed widespread public participation on multiple occasions,[12] and this Recommendation should help agencies cast a wide net when seeking input from all individuals and groups affected by a rule. The Recommendation aims to enhance agencies' ability to process comments they receive in the most efficient way possible and to ensure that the rulemaking process is transparent to prospective commenters and the public more broadly.

[10] 5 U.S.C. § 553.

[11] This Recommendation does not address what role particular types of comments should play in agency decision making or what consideration, if any, agencies should give to the number of comments in support of a particular position.

[12] *See* Recommendation 2018-7, *supra* note 6; Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75117 (Dec. 17, 2014); Recommendation 2013-5, *supra* note 6; Recommendation 2011-8, *supra* note 6; Admin. Conf. of the U.S., Recommendation 2011-7, *Federal Advisory Committee Act: Issues and Proposed Reforms*, 77 Fed. Reg. 2261 (Jan. 17, 2012); Recommendation 2011-2, *supra* note 6.

Agencies can advance the goals of public participation by being transparent about their comment policies or practices and by providing educational information about public involvement in the rulemaking process.[13] Agencies' ability to process comments can also be enhanced by digital technologies. As part of its e-Rulemaking Program, for example, the General Services Administration (GSA) has implemented technologies on the Regulations.gov platform that make it easier for agencies to verify that a commenter is a human being.[14] GSA's Regulations.gov platform also includes an application programming interface (API)—a feature of a computer system that enables different systems to communicate with it—to facilitate mass comment submission.[15] This technology platform allows partner agencies to better manage comments from identifiable entities that submit large volumes of comments. Some federal agencies also use a tool, sometimes referred to as de-duplication software, to identify and group identical or substantively identical comments~~sometimes to identify and group identical or substantively identical comments~~.

New software and technologies to manage public comments will likely emerge in the future, and agencies will need to keep apprised ~~of innovations in managing public comments~~of them. Agencies might also consider adopting ~~innovations that augment the notice-and-comment process with~~ alternative methods for encouraging public participation that augment the notice-and-comment process, particularly to the extent that doing so ameliorates some of the

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management challenges described above.[16] Because technology is rapidly changing, agencies will need to stay apprised of new developments that could enhance public participation in rulemaking.

Commented [CA4]: Proposed Amendment from Council # 3

Not all agencies will encounter mass, computer-generated, or ~~malattributed~~ falsely attributed comments. But some agencies have confronted all three, sometimes in the same rulemaking. In offering the best practices that follow, the Conference recognizes that agency needs and resources will vary. For this reason, agencies should tailor the best practices in this Recommendation to their particular rulemaking programs and the types of comments they receive or expect to receive.

RECOMMENDATION

Managing Mass Comments

1. The e-Rulemaking Program that the General Services Administration (GSA) administers should provide a common de-duplication tool for agencies to use, although GSA should allow agencies to modify the de-duplication tool to fit their needs or to use another tool, as appropriate. When agencies find it helpful to use other software tools to perform de-duplication or extract information from a large number of comments, they should use reliable and appropriate software. Such software should provide agencies with enhanced search options to identify the unique content of comments, such as the technologies used by commercial legal databases like Westlaw or LexisNexis.
2. To enable easier public navigation through online rulemaking dockets, agencies may welcome any person or entity organizing mass comments to submit comments with multiple signatures rather than separate identical or substantively identical comments.

[16] *See* Steve Balla, Reeve Bull, Bridget Dooling, Emily Hammond, Michael Herz, Michael Livermore, & Beth Simone Noveck, Mass, Computer-Generated, and Fraudulent Comments 43–48 (~~Apr~~June ~~.~~ 12, 2021) (~~draft~~ report to the Admin. Conf. of the U.S.).

Alternatively, agencies may wish to consider approaches to managing the display of comments online, such as by posting only a single representative example of identical comments in the online rulemaking docket or by breaking out and posting only non-identical content in the docket, taking into consideration the importance to members of the public to be able to verify that their comments were received and placed in the agency record. When agencies decide not to display all identical comments online, they should ~~be transparent about their actions~~provide publicly available explanations of their criteria for verifying the receipt of individual comments or locating identical comments in the docket and for deciding what comments to display. ~~and the existence of any process for verifying the receipt of individual comments or locating identical comments in the docket.~~

3. When an agency decides not to include all identical or substantively identical comments in its online rulemaking docket to improve the navigability of the docket, it should ensure that any reported total number of comments (such as in Regulations.gov or in the preambles to final rules) ~~accounts for~~includes the number of identical or substantively identical comments. ~~If resources permit~~If resources permit, agencies should separately report the total number of identical or substantively identical comments they receive. ~~,~~ ~~a~~Agencies should also consider providing an opportunity for interested members of the public to obtain or access all comments received.

Managing Computer-Generated Comments

4. If an agency identifies a comment as computer-generated, it may disregard the comment ~~unless the agency identifies it as having informational value~~.
5. To the extent feasible, agencies should flag any comments they have identified as computer-generated or display or store them separately from other comments. If an agency flags a comment as computer-generated, or displays or stores it separately from the online rulemaking docket, the agency should note its action in the docket. The agency may also choose to notify the submitter directly if doing so does not violate any relevant

Commented [CA5]: Proposed Amendment from Council # 4

Commented [CA6]: Proposed Amendment from Council # 5

Commented [CA7]: Proposed Amendment from Council # 6

policy prohibiting direct contact with senders of "spam" or similar communications.

6. Agencies that operate their own commenting platforms should consider using technology that verifies that a commenter is a human being, such as reCAPTCHA or another similar identity proofing tool. The e-Rulemaking Program should continue to retain this functionality.
7. If an agency considers or relies on a comment the agency knows to be computer-generated, it should include that comment in its online rulemaking docket. When publishing a final rule, agencies should note any computer-generated comments ~~on which~~ they considered or on which they relied. ~~rely that are computer-generated and~~ They should also state whether they removed from the docket any comments they identified as computer-generated.

Managing ~~Malattributed~~ Falsely Attributed Comments

8. Agencies should provide opportunities (including after the comment deadline) for individuals whose names or identifying information have been attached to comments they did not submit to identify such comments and to request that the comment be anonymized or removed from the online rulemaking docket.
9. If an agency flags a comment as ~~malattributed~~ falsely attributed or removes such a comment from the online rulemaking docket, it should note its action in the docket. Agencies may also choose to notify the purported submitter directly if doing so does not violate any agency policy.
10. If an agency relies on a comment it knows is ~~malattributed~~falsely attributed, it should include an anonymized version of that comment in its online rulemaking docket. When publishing a final rule, agencies should note any comments on which they rely that are ~~malattributed~~ falsely attributed and should state whether they removed from the docket

Commented [CA8]: Council Comment:

The Council would like the Committee and the consultants to address whether there is a risk that comment-review systems may reflect agency personnel's programmatic, ideological, or other biases with respect to the viewpoints expressed in or the source of comments; and, if the answer is "no," why that is the case. Depending on the answer, the Council may wish to suggest the inclusion of a new paragraph 7 (between current paragraphs 6 and 7) providing that "agencies should take steps to assure that decisions respecting whether comments are computer-generated (especially in the absence of a tool such as reCAPTCHA) and whether agencies disregard such comments are not influenced by agency personnel's programmatic, ideological, or other biases respecting the viewpoints expressed in or the source of comments." The Council is open to alternative formulations that capture the point.

Commented [CMA9]: Proposed Amendment from Government Member Helen Serassio:

I would suggest these minor edits because dockets should be populated with an eye towards the administrative record, which is comprised of all non-deliberative information that the agency considered, not just relied on. In addition, when addressing public comments in a final rule, the agency must respond to all substantive comments, which could include comments considered even if the agency did not ultimately rely on them. I think these edits will help cover the bases on either front.

any ~~malattributed~~ falsely attributed comments.

Enhancing Agency Transparency in the Comment Process

11. Agencies should inform the public about their policies concerning the posting and use of mass, computer-generated, and ~~malattributed~~ falsely attributed comments. These policies should take into account the meaningfulness of the public's opportunity to participate in the rulemaking process and should balance goals such as user-friendliness, transparency, and informational completeness. In their policies, agencies may provide for exceptions in appropriate circumstances.
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13. To encourage the most relevant submissions, agencies that have specific questions or are aware of specific information that may be useful should identify those questions or such information in their notices of proposed rulemaking.

Commented [CA10]: Proposed Amendment from Council # 7

Additional Opportunities for Public Participation

14. Agencies and relevant coordinating bodies should stay abreast of new technologies for facilitating informative public participation in rulemakings. These technologies may help agencies to process mass comments or identify and process computer-generated and

~~malattributed~~ falsely attributed comments. In addition, new technologies may offer new opportunities to engage the public, both as part of or as a supplement to the notice-and-comment process. Such opportunities may help ensure that agencies receive input from communities that may not otherwise have an opportunity to participate in the conventional comment process.

Coordination and Training

15. Agencies should work closely with relevant coordinating bodies to improve existing technologies and develop new technologies to address issues associated with mass, computer-generated, and ~~malattributed~~ falsely attributed comments. Agencies and relevant coordinating bodies should share best practices and relevant innovations for addressing challenges related to these comments.
16. Agencies should develop and offer opportunities for ongoing training and staff development to respond to the rapidly evolving nature of technologies related to mass, computer-generated, and ~~malattributed~~ falsely attributed comments and to public participation more generally.
17. As authorized by 5 U.S.C. § 594(2), the Conference's Office of the Chairman should provide for the "interchange among administrative agencies of information potentially useful in improving" agency comment processing systems. The subjects of interchange might include technological and procedural innovations, common management challenges, and legal concerns under the APA and other relevant statutes.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Periodic Retrospective Review

Committee on Administration and Management

Proposed Recommendation | June 17, 2021

Retrospective review is the process by which agencies assess existing regulations and decide whether they need to be revisited. Consistent with longstanding executive-branch policy,[1] the Administrative Conference has endorsed the practice of retrospective review of agency regulations[2] and has urged agencies to consider conducting retrospective review under a specific timeframe, which is often known as "periodic retrospective review."[3] Agencies may conduct periodic retrospective review in different ways. One common way is for an agency to engage in such review of some or all of its regulations on a pre-set schedule (e.g., every ten years). Another way is for the agency to set a one-time date for reviewing a regulation and, when that review is performed, set a new date for the next review, and so on. This latter method enables the agency to adjust the frequency of a regulation's periodic retrospective review in light of experience.

Periodic retrospective review may occur because a statute requires it or because an agency simply chooses to do it. Statutes requiring periodic retrospective review may specify a time interval over which review should be conducted or leave the frequency up to the agency. The Clean Air Act, for example, requires the Environmental Protection Agency to review certain

[1] *See* Exec. Order No. 12866, 58 Fed. Reg. 51735, 51739–51740 (Sept. 30, 1993); *see also* Joseph E. Aldy, Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy 27 (Nov. 17, 2014) (report to the Admin. Conf. of the U.S.) ("The systematic review of existing regulations across the executive branch dates back, in one form or another, to the Carter Administration.").

[2] *See* Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61738 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43108 (Aug. 18, 1995).

[3] Recommendation 95-3, *supra* note 2.

ambient air quality regulations every five years.[4] On the other hand, Congress only stated that the Department of Transportation must "specify procedures for the periodic review and update" of its rule on early warning reporting requirements for manufacturers of motor vehicles, and did not specify how often that review must occur.[5] Where periodic retrospective review is not mandated by statute, agencies have sometimes voluntarily implemented periodic retrospective review programs.[6]

Periodic retrospective review can enhance the quality of agencies' regulations by helping agencies determine whether regulations continue to meet their statutory objectives. Such review can also assist agencies in evaluating regulatory performance (e.g., the benefits, costs, ancillary impacts,[7] and distributional impacts[8] of regulations), and assess whether and how a regulation should be revised in a new rulemaking. And periodic retrospective review can help agencies determine the accuracy of the assessments they made before issuing their regulations (including assessments regarding forecasts of benefits, costs, ancillary impacts, and distributional impacts) and identify ways to improve the accuracy of those assessment methodologies.[9]

There can also be drawbacks associated with periodic retrospective review. Some regulations may not be strong candidates for such review because the need for the regulations is unlikely to change and the benefits associated with periodically revisiting them are small. There are costs associated with collecting data and analyzing it, and time spent on reviewing existing

[4] 42 U.S.C. § 7309(d)(1).

[5] 49 U.S.C. § 30166(m)(5).

[6] *See* Lori S. Bennear & Jonathan B. Wiener, Periodic Review of Agency Regulation 33–38 (Apr. 1, 2021) (draft report to the Admin. Conf. of the U.S.) (discussing periodic retrospective review plans issued by several agencies, including the Department of Transportation, the Securities and Exchange Commission, and the Federal Emergency Management Agency).

[7] An ancillary impact is an "impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking . . . ." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS 26 (2003).

[8] A distributional impact is an "impact of a regulatory action across the population and economy, divided up in various ways (e.g., by income groups, race, sex, industrial sector, geography)." *Id.* at 14.

[9] *Id.* at 8.

regulations is time that may not be spent on other important regulatory activities. For this reason, agencies might reasonably decide to limit periodic retrospective review to certain types of regulations, such as important regulations that affect large numbers of people or that have particularly pronounced effects on specific groups.[10] Periodic retrospective review can also generate uncertainty regarding whether a regulation will be retained or modified. Agencies, therefore, should carefully tailor their periodic retrospective review plans.

Mindful of both the value of periodic retrospective review and the tradeoffs associated with it, this Recommendation offers practical suggestions to agencies about how to establish a periodic retrospective review plan. It does so by, among other things, identifying the types of regulations that lend themselves well to periodic retrospective review, proposing factors for agencies to consider in deciding the optimal review frequency when they have such discretion, and identifying different models for staffing periodic retrospective review. In doing so, it builds upon the Administrative Conference's longstanding endorsement of public participation in all aspects of the rulemaking process,[11] including retrospective review,[12] by encouraging agencies to seek public input to both help identify the types of regulations that lend themselves well to periodic retrospective review and inform that review.

This Recommendation also recognizes the important role that the Office of Management and Budget (OMB) plays in agencies' periodic retrospective review efforts and the significance of the Foundations for Evidence-Based Policymaking Act (the Evidence Act) and associated OMB-issued guidance.[13] It suggests that agencies work with OMB to help facilitate data collection relevant to reviewing regulations. It calls attention to the Evidence Act's requirements for certain agencies to create Learning Agendas and Annual Evaluation Plans, which lay out

[10] *See, e.g.,* Recommendation 2014-5, *supra* note 2, ¶ 5 .

[11] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017).

[12] *See supra* note 2.

[13] *See* Bennear & Wiener, *supra* note 6.

research questions that agencies plan to address regarding their missions, including their regulatory missions, and how they intend to address these questions.[14] Consistent with the Evidence Act, the Recommendation states that agencies can incorporate periodic retrospective reviews in their Learning Agendas and Annual Evaluation Plans by undertaking and documenting certain activities as they carry out their reviews.

RECOMMENDATION

Selecting the Types of Regulations to Subject to Periodic Retrospective Review and the Frequency of Review

1. Agencies should identify any specific regulations or categories of regulations that are subject to statutory periodic retrospective review requirements.
2. For regulations not subject to statutory periodic retrospective review requirements, agencies should establish a periodic retrospective review plan. In deciding which regulations, if any, should be subject to this review plan, agencies should consider the public benefits of periodic retrospective review, including potential gains from learning more about regulatory performance, and the costs, including the administrative burden associated with performing the review and any disruptions to reliance interests and investment-backed expectations. When agencies adopt new regulations for which decisions regarding periodic retrospective review have not been established, agencies should, as part of the process of developing such regulations, decide whether those regulations should be subject to periodic retrospective review.
3. When planning for periodic retrospective review agencies should not limit themselves to reviewing a specific final regulation when a review of a larger regulatory program would be more constructive.

[14] 5 U.S.C. § 312(a)–(b); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMORANDUM M-19-23, PHASE 1 IMPLEMENTATION OF THE FOUNDATIONS FOR EVIDENCE-BASED POLICYMAKING ACT OF 2018: LEARNING AGENDAS, PERSONNEL, AND PLANNING GUIDANCE (2019); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMORANDUM M-20-12, PHASE 4 IMPLEMENTATION OF THE FOUNDATIONS FOR EVIDENCE-BASED POLICYMAKING ACT OF 2018: PROGRAM EVALUATION STANDARDS AND PRACTICES (2020).

4. For regulations that agencies decide to subject to periodic retrospective review, agencies should decide whether to subject some or all of the regulations to a pre-set schedule of review or whether some or all of the regulations should have only an initial date for review, with a subsequent date for each review set at the time of the preceding review. In either case, agencies should decide the optimal frequency of review for a pre-set schedule of review or the optimal period before the first review. In selecting the frequency of review or setting the first or any subsequent date of review, agencies should consider, among others, the following factors:
    a. The pace of change of the technology, science, sector of the economy, or part of society affected by the regulation. A higher pace of change may warrant more frequent review;
    b. The degree of uncertainty about the accuracy of the initial estimates of regulatory benefits, costs, ancillary impacts, and distributional impacts. Greater uncertainty may warrant more frequent review;
    c. Changes in the statutory framework under which the regulation was issued. More changes may warrant more frequent review;
    d. Comments, complaints, requests for waivers or exemptions, or suggestions received from interested groups and members of the public. The level of public interest or amount of new evidence regarding changing the regulation may warrant more frequent review;
    e. The difficulties arising from implementation of the regulation, as demonstrated by poor compliance rates, requests for waivers or exemptions, the amount of clarifying guidance issued, remands from the courts, or other factors. Greater difficulties may warrant more frequent review;
    f. The administrative burden in conducting periodic retrospective review. Larger burdens, such as greater staff time, involved in reviewing the regulation may warrant less frequent review; and

g. Reliance interests and investment-backed expectations connected with the regulation. Greater reliance or expectations may lend themselves to less frequent review.

5. In making the decisions outlined in Recommendations 1 through 4, public input can help agencies identify which regulations should be subject to periodic retrospective review and with what frequency. Agencies should consider soliciting public input by means such as convening meetings of interested persons, engaging in targeted outreach efforts to historically underrepresented or under-resourced groups, and posting requests for information.
6. Agencies should publicly disclose their periodic retrospective review plans, which should cover issues such as which regulations are subject to periodic retrospective review, how frequently those regulations are reviewed, what the review entails, and whether the review is conducted pursuant to a legal requirement or the agencies' own initiative. Agencies should include these notifications on their websites and consider publishing them in the *Federal Register*, even if the law does not require it.
7. With respect to regulations subject to a pre-set schedule of periodic retrospective review, agencies should periodically reassess the regulations that should be subject to periodic retrospective review and the optimal frequency of review.

Publishing Results of Periodic Retrospective Review and Soliciting Public Feedback on Regulations Subject to Review

8. Agencies should publish a document or set of documents in a prominent, easy-to-find place on the portion of their websites dealing with rulemaking matters, explaining how they conducted a given periodic retrospective review, what information they considered, and what public outreach they undertook. They should also include this document or set of documents on Regulations.gov. To the extent appropriate, agencies should organize the data in the document or set of documents in ways that allow private parties to re-create the agencies' work and run additional analyses concerning existing regulations'

effectiveness. When feasible, agencies should also explain in plain language the significance of their data and how they used the data to shape their review.

9. Agencies should seek input from relevant parties when conducting periodic retrospective review. Possible outreach methods include convening meetings of interested persons; engaging in targeted outreach efforts, such as proactively bringing the regulation to the attention of historically underrepresented or under-resourced groups; and posting requests for information on the regulation. Agencies should integrate relevant information from the public into their periodic retrospective reviews.
10. Agencies should work with the Office of Management and Budget (OMB) to properly invoke any flexibilities within the Paperwork Reduction Act that would enable them to gather relevant data expeditiously.

Ensuring Adequate Resources and Staffing

11. Agencies should decide how to best structure their staffing of periodic retrospective reviews to foster a culture of retrospective review and ongoing learning. Below are examples of some staffing models, which may be used in tandem or separately:
    a. Assigning the same staff the same regulation, or category of regulation, each time it is reviewed. This approach allows staff to gain expertise in a particular kind of regulation, thereby potentially improving the efficiency of the review;
    b. Assigning different staff the same regulation, or category of regulation, each time it is reviewed. This approach promotes objectivity by allowing differing viewpoints to enter into the analysis;
    c. Engaging or cooperating with agency or non-agency subject matter experts to review regulations; and
    d. Pairing subject matter experts, such as engineers, economists, sociologists, and scientists, with other agency employees in conducting the review. This approach maximizes the likelihood that both substantive considerations, such as the net benefits and distributional and ancillary impacts of the regulation, and procedural

considerations, such as whether the regulation conflicts with other regulations or complies with plain language requirements, will enter into the review.

Using Evidence Act Processes

12. Consistent with the Evidence Act, agencies should incorporate periodic retrospective reviews in their Learning Agendas and Annual Evaluation Plans. In doing so, agencies should ensure that they include:
    a. The precise questions they intend to answer using periodic retrospective review. Those questions should include how frequently particular regulations should be reviewed and should otherwise be keyed to the factors set forth in Section 5 of Executive Order 12866 for periodic retrospective review of existing significant regulations;
    b. The information needed to adequately review the regulations subject to the periodic retrospective reviews. Agencies should state whether they will undertake new information collection requests or use existing information to conduct the reviews;
    c. The methods the agencies will use in conducting their reviews, which should comport with the federal program evaluation standards set forth by OMB;
    d. The anticipated challenges the agencies anticipate encountering during the reviews, if any, such as obstacles to collecting relevant data; and
    e. The ways the agencies will use the results of the reviews to inform policy making.

Interagency Coordination

13. Agencies that are responsible for coordinating activities among other agencies, such as the Office of Information and Regulatory Affairs, should, as feasible, regularly convene agencies to identify and share best practices on periodic retrospective review. These agencies should address questions such as how to improve timeliness and analytic quality of review and the optimal frequency of discretionary review.

14. To promote a coherent regulatory scheme, agencies should coordinate their periodic retrospective reviews with other agencies that have issued related regulations.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Periodic Retrospective Review

Committee on Administration and Management

Proposed Recommendation | June 17, 2021

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council (with sources shown in the margin).

Retrospective review is the process by which agencies assess existing regulations and decide whether they need to be revisited. Consistent with longstanding executive-branch policy,[1] the Administrative Conference has endorsed the practice of retrospective review of agency regulations[2] and has urged agencies to consider conducting retrospective review under a specific timeframe, which is often known as "periodic retrospective review."[3] Agencies may conduct periodic retrospective review in different ways. One common way is for an agency to ~~engage in such~~undertake review of some or all of its regulations on a pre-set schedule (e.g., every ten years). Another way is for the agency to set a one-time date for reviewing a regulation and, when that review is performed, set a new date for the next review, and so on. This latter method enables the agency to adjust the frequency of a regulation's periodic retrospective review in light of experience.

[1] *See* Exec. Order No. 12866, 58 Fed. Reg. 51735, 51739–51740 (Sept. 30, 1993); *see also* Joseph E. Aldy, Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy 27 (Nov. 17, 2014) (report to the Admin. Conf. of the U.S.) ("The systematic review of existing regulations across the executive branch dates back, in one form or another, to the Carter Administration.").

[2] *See* Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61738 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43108 (Aug. 18, 1995).

[3] Recommendation 95-3, *supra* note 2.

Periodic retrospective review may occur because a statute requires it or because an agency ~~simply~~ chooses to do it on its own initiative. Statutes requiring periodic retrospective review may specify a time interval over which review should be conducted or leave the frequency up to the agency. The Clean Air Act, for example, requires the Environmental Protection Agency to review certain ambient air quality regulations every five years.[4] On the other hand, the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act provides that the ~~Congress only stated that the~~ Department of Transportation must "specify procedures for the periodic review and update" of its rule on early warning reporting requirements for manufacturers of motor vehicles~~, and did not specify~~ without specifying how often that review must occur.[5] ~~Where~~ Even when periodic retrospective review is not mandated by statute, agencies have sometimes voluntarily implemented periodic retrospective review programs.[6]

Periodic retrospective review can enhance the quality of agencies' regulations by helping agencies determine whether regulations continue to meet their statutory objectives. Such review can also ~~assist~~ help agencies ~~in evaluating~~evaluate regulatory performance (e.g., the benefits, costs, ancillary impacts,[7] and distributional impacts[8] of regulations), ~~and~~ assess whether and how a regulation should be revised in a new rulemaking. ~~. And periodic retrospective review can help agencies~~ determine the accuracy of the assessments they made before issuing their regulations (including assessments regarding forecasts of benefits, costs, ancillary impacts, and distributional

[4] 42 U.S.C. § 7309(d)(1).

[5] 49 U.S.C. § 30166(m)(5).

[6] *See* Lori S. Bennear & Jonathan B. Wiener, Periodic Review of Agency Regulation 33–38 (~~Apr. 1, 2021~~June 7, 2021) (~~draft~~ report to the Admin. Conf. of the U.S.) (discussing periodic retrospective review plans issued by several agencies, including the Department of Transportation, the Securities and Exchange Commission, and the Federal Emergency Management Agency).

[7] An ancillary impact is an "impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking . . . ." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS 26 (2003).

[8] A distributional impact is an "impact of a regulatory action across the population and economy, divided up in various ways (e.g., by income groups, race, sex, industrial sector, geography)." *Id.* at 14.

impacts). and identify ways to improve the accuracy of those the underlying assessment methodologies.[9]

There But there can also be drawbacks associated with periodic retrospective review. Some regulations may not be strong candidates for such review because the need for the regulations is unlikely to change and the benefits associated with periodically revisiting them are likely to be small. There are also costs associated with collecting and analyzing data and analyzing it, and time spent on reviewing existing regulations may come at the cost of is time that may not be spent on other important regulatory activities. For this reason, agencies might reasonably decide to limit periodic retrospective review to certain types of regulations, such as important regulations that affect large numbers of people or that have particularly pronounced effects on specific groups.[10] Periodic retrospective review can also generate uncertainty regarding whether a regulation will be retained or modified. Agencies, therefore, should carefully tailor their periodic retrospective review plans carefully to account for these drawbacks.

Mindful of both the value of periodic retrospective review and the tradeoffs associated with it, this Recommendation offers practical suggestions to agencies about how to establish a periodic retrospective review plans. It does so by, among other things, identifying the types of regulations that lend themselves well to periodic retrospective review, proposing factors for agencies to consider in deciding the optimal review frequency when they have such discretion, and identifying different models for staffing periodic retrospective review. In doing so, it builds upon the Administrative Conference's longstanding endorsement of public participation in all aspects of the rulemaking process,[11] including retrospective review,[12] by encouraging agencies to

[9] *Id.* at 8.

[10] *See, e.g.,* Recommendation 2014-5, *supra* note 2, ¶ 5 (providing a list of factors for agencies to consider when prioritizing some regulations as important).

[11] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017).

[12] *See supra* note 2.

seek public input ~~to~~ both to help identify the types of regulations that lend themselves well to periodic retrospective review and to inform that review.

This Recommendation also recognizes the important role that the Office of Management and Budget (OMB) plays in agencies' periodic retrospective review efforts ~~and~~ as well as the significance of the Foundations for Evidence-Based Policymaking Act (the Evidence Act) and associated OMB-issued guidance.[13] It ~~suggests that~~encourages agencies to work with OMB to help facilitate data collection relevant to reviewing regulations. It also calls attention to the Evidence Act's requirements ~~for~~ that certain agencies ~~to~~ create Learning Agendas, which identify questions for agencies to address regarding their regulatory missions, and Annual Evaluation Plans, which lay out specific measures agencies will take to answer those questions.~~research questions that agencies plan to address regarding their missions, including their regulatory missions, and how they intend to address these questions.~~[14] Consistent with the Evidence Act, the Recommendation ~~states~~ provides that agencies can incorporate periodic retrospective review~~s~~ in their Learning Agendas and Annual Evaluation Plans by undertaking and documenting certain activities as they carry out their review~~s~~.

In issuing this Recommendation, the Conference recognizes that agencies will need to consider available resources in deciding whether a periodic retrospective review program should be implemented and, if so, what form it should take. The recommendations offered below are subject to that qualification.

Commented [CA1]: Proposed Amendment from Council # 1

[13] *See* Bennear & Wiener, *supra* note 6.

[14] 5 U.S.C. § 312(a)–(b); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMORANDUM M-19-23, PHASE 1 IMPLEMENTATION OF THE FOUNDATIONS FOR EVIDENCE-BASED POLICYMAKING ACT OF 2018: LEARNING AGENDAS, PERSONNEL, AND PLANNING GUIDANCE (2019); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMORANDUM M-20-12, PHASE 4 IMPLEMENTATION OF THE FOUNDATIONS FOR EVIDENCE-BASED POLICYMAKING ACT OF 2018: PROGRAM EVALUATION STANDARDS AND PRACTICES (2020).

RECOMMENDATION

Selecting the Types of Regulations to Subject to Periodic Retrospective Review and the Frequency of Review

1. Agencies should identify any specific regulations or categories of regulations that are subject to statutory periodic retrospective review requirements.
2. For regulations not subject to statutory periodic retrospective review requirements, agencies should establish a periodic retrospective review plan. In deciding which regulations, if any, should be subject to ~~this~~ such a review plan, agencies should consider the public benefits of periodic retrospective review, including potential gains from learning more about regulatory performance, and the costs, including the administrative burden associated with performing the review and any disruptions to reliance interests and investment-backed expectations. When agencies adopt new regulations for which ~~decisions~~ plans regarding periodic retrospective review have not been established, agencies should, as part of the process of developing such regulations, decide whether those regulations should be subject to periodic retrospective review.
3. When ~~planning~~ agencies plan for periodic retrospective review, ~~agencies~~ they should not limit themselves to reviewing a specific final regulation when a review of a larger regulatory program would be more constructive.
4. ~~For regulations that~~When agencies decide to subject regulations to periodic retrospective review, ~~agencies~~ they should decide whether to subject some or all of the regulations to a pre-set schedule of review or whether, for some or all of the regulations, it is preferable to set ~~should have~~ only an initial date for review and decide, as part of that review, when to undertake the next review.~~, with a subsequent date for each review set at the time of the preceding review. In either case, agencies should decide the optimal frequency of review for a pre-set schedule of review or the optimal period before the first review.~~ In selecting the frequency of review or setting the first or any subsequent date of review, agencies should consider, among others, the following factors:

a. The pace of change of the technology, science, sector of the economy, or part of society affected by the regulation. A higher pace of change may warrant more frequent review;

b. The degree of uncertainty about the accuracy of the initial estimates of regulatory benefits, costs, ancillary impacts, and distributional impacts. Greater uncertainty may warrant more frequent review;

c. Changes in the statutory framework under which the regulation was issued. More changes may warrant more frequent review;

d. Comments, complaints, requests for waivers or exemptions, or suggestions received from interested ~~groups and members of the public~~persons. The level of public interest or amount of new evidence regarding changing the regulation may warrant more frequent review;

e. The difficulties arising from implementation of the regulation, as demonstrated by poor compliance rates, requests for waivers or exemptions, the amount of clarifying guidance issued, remands from the courts, or other factors. Greater difficulties may warrant more frequent review;

f. The administrative burden in conducting periodic retrospective review. Larger burdens, such as greater staff time, involved in reviewing the regulation may warrant less frequent review; and

g. Reliance interests and investment-backed expectations connected with the regulation. ~~Greater reliance or expectations may lend themselves to less frequent review.~~ Steps taken by persons in reliance on a particular regulation or with the expectation that it will remain unaltered may weigh in favor of less frequent review.

5. In making the decisions outlined in ~~Recommendations~~ Paragraphs 1 through 4, public input can help agencies identify which regulations should be subject to periodic retrospective review and with what frequency. Agencies should consider soliciting public input by means such as convening meetings of interested persons, engaging in targeted

outreach efforts to historically underrepresented or under-resourced groups that may be affected by the agencies' regulations, and posting requests for information.

6. Agencies should publicly disclose their periodic retrospective review plans, which should cover issues such as which regulations are subject to periodic retrospective review, how frequently those regulations are reviewed, what the review entails, and whether the review is conducted pursuant to a legal requirement or the agencies' own initiative. Agencies should include these notifications on their websites and consider publishing them in the *Federal Register*, even if the law does not require it.
7. With respect to regulations subject to a pre-set schedule of periodic retrospective review, agencies should periodically reassess the regulations that should be subject to periodic retrospective review and the optimal frequency of review.

Publishing Results of Periodic Retrospective Review and Soliciting Public Feedback on Regulations Subject to Review

8. Agencies should publish ~~a document or set of documents~~ in a prominent, easy-to-find place on the portion of their websites dealing with rulemaking matters, a document or set of documents explaining how they conducted a given periodic retrospective review, what information they considered, and what public outreach they undertook. They should also include this document or set of documents on Regulations.gov. To the extent appropriate, agencies should organize the data in the document or set of documents in ways that allow private parties to re-create the agencies' work and run additional analyses concerning existing regulations' effectiveness. When feasible, agencies should also explain in plain language the significance of their data and how they used the data to shape their review.
9. Agencies should seek input from relevant parties when conducting periodic retrospective review. Possible outreach methods include convening meetings of interested persons; engaging in targeted outreach efforts, such as proactively bringing the regulation to the attention of historically underrepresented or under-resourced groups; and posting requests for information on the regulation. Agencies should integrate relevant information from the public into their periodic retrospective reviews.

Commented [CA2]: Proposed Amendment from Council # 2

10. Agencies should work with the Office of Management and Budget (OMB) to properly invoke any flexibilities within the Paperwork Reduction Act that would enable them to gather relevant data expeditiously.

Ensuring Adequate Resources and Staffing

11. Agencies should decide how ~~to~~ best to structure their staffing of periodic retrospective reviews to foster a culture of retrospective review and ongoing learning. Below are examples of some staffing models, which may be used in tandem or separately:
    a. Assigning the same staff the same regulation, or category of regulation, each time it is reviewed. This approach allows staff to gain expertise in a particular kind of regulation, thereby potentially improving the efficiency of the review;
    b. Assigning different staff the same regulation, or category of regulation, each time it is reviewed. This approach promotes objectivity by allowing differing viewpoints to enter into the analysis;
    c. Engaging or cooperating with agency or non-agency subject matter experts to review regulations; and
    d. Pairing subject matter experts, such as engineers, economists, sociologists, and scientists, with other agency employees in conducting the review. This approach maximizes the likelihood that both substantive considerations, such as the net benefits and distributional and ancillary impacts of the regulation, and procedural considerations, such as whether the regulation conflicts with other regulations or complies with plain language requirements, will enter into the review.

Using Evidence Act Processes

12. Consistent with the Evidence Act, agencies should incorporate periodic retrospective reviews in their Learning Agendas and Annual Evaluation Plans. In doing so, agencies should ensure that they include:
    a. The precise questions they intend to answer using periodic retrospective review. Those questions should include how frequently particular regulations should be

reviewed and should otherwise be keyed to the factors set forth in Section 5 of Executive Order 12866 for periodic retrospective review of existing significant regulations;

b. The information needed to adequately review the regulations subject to the periodic retrospective reviews. Agencies should state whether they will undertake new information collection requests or use existing information to conduct the reviews;

c. The methods the agencies will use in conducting their reviews, which should comport with the federal program evaluation standards set forth by OMB;

d. The anticipated challenges the agencies anticipate encountering during the reviews, if any, such as obstacles to collecting relevant data; and

e. The ways the agencies will use the results of the reviews to inform policy making.

Interagency Coordination

13. Agencies that are responsible for coordinating activities among other agencies, such as the Office of Information and Regulatory Affairs, should, as feasible, regularly convene agencies to identify and share best practices on periodic retrospective review. These agencies should address questions such as how to improve timeliness and analytic quality of review and the optimal frequency of discretionary review.

14. To promote a coherent regulatory scheme, agencies should coordinate their periodic retrospective reviews with other agencies that have issued related regulations.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Early Input on Regulatory Alternatives

Committee on Regulation

Proposed Recommendation | June 17, 2021

Agency development of and outreach concerning regulatory alternatives prior to issuing a notice of proposed rulemaking on important issues often results in a better-informed notice-and-comment process, facilitates decision making, and improves rules. In this context, the term "regulatory alternative" is used broadly and could mean, among other things, a different method of regulating, a different level of stringency in the rule, or not regulating at all.[1] Several statutes and executive orders, including the National Environmental Policy Act (NEPA),[2] the Regulatory Flexibility Act (RFA),[3] and Executive Order 12866,[4] require federal agencies to identify and consider alternative regulatory approaches before proposing certain new rules. This Recommendation suggests best practices for soliciting early input whendeveloping regulatory alternatives, whether or not it is legally required, before publishing a notice of proposed rulemaking (NPRM). It also provides best practices for publicizing the alternatives considered when agencies are promulgating important rules.

The Administrative Conference has previously recommended that agencies engage with the public throughout the rulemaking process, including by seeking input while agencies are still

[1] *See* Christopher Carrigan & Stuart Shapiro, Developing Regulatory Alternatives Through Early Input 8 (April 1, 2021) (draft report to the Admin. Conf. of the U.S.).

[2] 42 U.S.C. § 4332(C)(iii) (requiring agencies to consider alternatives in environmental impact statements under NEPA).

[3] 5 U.S.C. § 603(c) (requiring agencies to consider alternatives in regulatory flexibility analyses conducted under the Regulatory Flexibility Act of 1980, as amended by SBREFA).

[4] Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

in the early stages of shaping a rule.[5] Agencies might conduct this outreach while developing their regulatory priorities, including in the proposed regulatory plans agencies are required to prepare under Executive Order 12866.[6] Seeking early input before issuing a notice of proposed rulemaking can help agencies identify alternatives and learn more about the benefits, costs, distributional impacts,[7] and technical feasibility of alternatives to the proposal they are considering. Doing so is particularly important, even if not required by law or executive order, for a proposal likely to draw significant attention for its economic or other significance. It can also be especially valuable for agencies seeking early input on regulatory alternatives to reach out to a wide range of interested persons, including affected groups that often are underrepresented in the administrative process and may suffer disproportionate harms from a proposed rule.[8]

When seeking early input on rulemaking alternatives, agencies might consider approaches modeled on practices that other agencies already use. In so doing, they might look at agency practices that are required by statute (e.g., the Small Business Regulatory Enforcement Fairness Act (SBREFA))[9] or agency rules (e.g., the Department of Energy's "Process Rule"),[10]

[5] *See* Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, ¶ 5, 84 Fed. Reg. 2146, 2148 (Feb. 6, 2019); s*ee also, e.g.,* Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, 50 Fed. Reg. 28364 (July 12, 1985); Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking 62–77 (Nov. 19, 2018).

[6] *See* Exec. Order No. 12866, *supra* note 4, § 4(c).

[7] A distributional impact is an "impact of a regulatory action across the population and economy, divided up in various ways (e.g., income groups, race, sex, industrial sector, geography)." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS 14 (2003).

[8] *See* Exec. Order. No. 13985, 86 Fed. Reg 7009 (Jan. 25, 2021) (directing the Office of Management and Budget, in partnership with agencies, to ensure that agency policies and actions are equitable with respect to race, ethnicity, religion, income, geography, gender identity, sexual orientation, and disability); Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 26, 2021) (requiring the Office of Management and Budget to produce recommendations regarding improving regulatory review that, among other things, "propose procedures that take into account the distributional consequences of regulations . . . to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities").

[9] 5 U.S.C. § 609.

[10] 10 C.F.R. § 430, Subpart C, App. A.

or practices that agencies have voluntarily undertaken in the absence of any legal requirement. To the extent permitted by law, agencies might also discuss the extent of their early outreach efforts and their process for selecting among the various alternatives considered in their notices of proposed rulemaking. Doing so allows agencies to demonstrate their serious consideration of the possible alternatives and provides information that will be useful to public commenters during the notice-and-comment process.[11]

Nevertheless, seeking early input on alternatives may not be appropriate in all cases. In some instances, the alternatives may be obvious. In others, the subject matter may be so obscure that public input is unlikely to prove useful. And in all cases, agencies face resource constraints and competing priorities, so agencies may wish to limit early public input to a subclass of rules such as those with substantial impact. Agencies will need to consider whether the benefits of early outreach outweigh the costs, including the resources required to conduct the outreach and any delays entailed. When agencies do solicit early input, they will still want to tailor their outreach to ensure that they are soliciting input in a way that is cost-effective, is equitable, and maximizes the likelihood of obtaining diverse, useful responses.

RECOMMENDATION

1. When determining whether to seek early input from knowledgeable persons to identify potential regulatory alternatives or respond to alternatives an agency has already identified, the agency should consider factors such as:
    a. The extent of the agency's familiarity with the policy issues and key alternatives;
    b. The extent to which the issue being regulated or any of the alternatives suggested are novel;
    c. The degree to which potential alternatives implicate specialized technical or technological expertise;
    d. The complexity of the underlying policy question and the proposed alternatives;

[11] *See* Carrigan & Shapiro, *supra* note 1, at 37.

e. The potential magnitude of the costs and benefits of the alternatives proposed;
f. The likelihood that the selection of an alternative will be controversial;
g. The time and resources that conducting such outreach would require;
h. The extent of the discretion to select among alternatives, given the statutory language it is implementing;
i. The deadlines the agency faces, if any, and the harms that might occur from the delay required to solicit and consider early feedback;
j. The extent to which certain groups that are affected by the proposed regulation and have otherwise been underrepresented in the agency's administrative process may suffer adverse distributional effects from generally beneficial proposals; and
k. The extent to which experts in other agencies may have valuable input on alternatives.

2. In determining what outreach to undertake concerning possible regulatory alternatives, an agency should consider using, consistent with available resources and feasibility, methods of soliciting public input including:
   a. Meetings with interested persons held regularly or as-needed based on rulemaking activities;
   b. Listening sessions;
   c. Internet and social media forums;
   d. Focus groups;
   e. Advisory committees, including those tasked with conducting negotiated rulemaking;
   f. Advance notices of proposed rulemakings (ANPRMs); and
   g. Requests for information (RFIs).

   The agency should also consider how to ensure that its interactions with outside persons are transparent, to the maximum extent permitted by law.
3. An agency should consider whether the methods it uses to facilitate early outreach in its rulemaking process will engage a wide range of interested persons, including individuals and groups that are affected by the rule and are traditionally underrepresented in the

agency's rulemaking processes. The agency should consider which methods would best facilitate such outreach, including providing materials designed for the target participants. For example, highly technical language may be appropriate for some, but not all, audiences. The agency should endeavor to make participation by individuals and entities that have less time and fewer resources as easy as possible, particularly when those potential participants do not have experience in the rulemaking process. The agency should explain possible consequences of the potential rulemaking to help potential participants understand the importance of their input and to encourage their participation in the outreach.

4. If an agency is unsure what methods of soliciting public input will best meet its needs and budget, it should consider testing different methods to generate alternatives or receive input on the regulatory alternatives it is considering before issuing notices of proposed rulemaking (NPRMs). As appropriate, the agency should describe the outcomes of using these different methods in the NPRMs for rules in which they are used.
5. An agency should ensure that all its relevant officials, including economists, scientists, and other experts, have an opportunity to identify potential regulatory alternatives during the early input process. As appropriate, the agency should also reach out to select experts in other agencies for input on alternatives.
6. An agency should consider providing in the NPRM a discussion of the reasonable regulatory alternatives it has considered or that have been suggested to it, including alternatives it is not proposing to adopt, together with the reasons it is not proposing to adopt those alternatives. To the extent the agency is concerned about revealing the identity of the individuals or groups offering proposed alternatives due to privacy or confidentiality concerns, it should consider characterizing the identity (e.g., industry representative, environmental organization, etc.) or listing the alternatives without ascribing them to any particular person.
7. When an agency discusses regulatory alternatives in the preamble of a proposed or final rule, it should also consider including a discussion of any reasonable alternatives suggested or considered through early public input, but which the agency believes are

precluded by statute. The discussion should also include an explanation of the agency's views on the legality of those alternatives.

8. To help other agencies craft best practices for early engagement with the public, an agency should, when feasible, share data and other information about the effectiveness of its efforts to solicit early input on regulatory alternatives.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Early Input on Regulatory Alternatives

Committee on Regulation

Proposed Recommendation | June 17, 2021

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and a Conference Member comment (with source shown in the margin).

Agency development of and outreach concerning regulatory alternatives prior to issuing a notice of proposed rulemaking (NPRM) on important issues often results in a better-informed notice-and-comment process, facilitates decision making, and improves rules. In this context, the term "regulatory alternative" is used broadly and could mean, among other things, a different method of regulating, a different level of stringency in the rule, or not regulating at all.[1] Several statutes and executive orders, including the National Environmental Policy Act (NEPA),[2] the Regulatory Flexibility Act ~~(RFA)~~,[3] and Executive Order 12866,[4] require federal agencies to identify and consider alternative regulatory approaches before proposing certain new rules. This Recommendation suggests best practices for soliciting early input ~~when~~during the process of developing regulatory alternatives, whether or not it is ~~legally~~ required by law or executive order, before publishing an ~~notice of proposed rulemaking (~~NPRM~~)~~. It also provides best practices for

[1] *See* Christopher Carrigan & Stuart Shapiro, Developing Regulatory Alternatives Through Early Input 8 (June ~~4April 1~~, 2021) (~~draft~~ report to the Admin. Conf. of the U.S.).

[2] 42 U.S.C. § 4332(C)(iii) (requiring agencies to consider alternatives in environmental impact statements under NEPA).

[3] 5 U.S.C. § 603(c) (requiring agencies to consider alternatives in regulatory flexibility analyses conducted under the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act).

[4] Exec. Order No. 12866, § 1, 58 Fed. Reg. 51735, 51735–36 (Sept. 30, 1993).

publicizing the alternatives considered when agencies are promulgating important rules.[5]

The Administrative Conference has previously recommended that agencies engage with the public throughout the rulemaking process, including by seeking input while agencies are still in the early stages of shaping a rule.[6] Agencies might conduct this outreach while developing their regulatory priorities, including in the proposed regulatory plans agencies are required to prepare under Executive Order 12866.[7] Seeking early input before issuing a notice of proposed rulemaking can help agencies identify alternatives and learn more about the benefits, costs, distributional impacts,[8] and technical feasibility of alternatives to the proposal they are considering. Doing so is particularly important, even if not required by law or executive order, for a proposal likely to draw significant attention for its economic or other significance. It can also be especially valuable for agencies seeking early input on regulatory alternatives to reach out to a wide range of interested persons, including affected groups that often are underrepresented in the administrative process and may suffer disproportionate harms from a proposed rule.[9]

[5] *See* Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, ¶ 6, 79 Fed. Reg. 75114, 75116–17 (Dec. 17, 2014).

[6] *See* Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, ¶ 5, 84 Fed. Reg. 2146, 2148 (Feb. 6, 2019); s*ee also, e.g.,* Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, 50 Fed. Reg. 28364 (July 12, 1985); Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking 62–77 (Nov. 19, 2018).

[7] *See* Exec. Order No. 12866, *supra* note 4, § 4(c).

[8] A distributional impact is an "impact of a regulatory action across the population and economy, divided up in various ways (e.g., income groups, race, sex, industrial sector, geography)." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS 14 (2003).

[9] *See* Exec. Order. No. 13985, 86 Fed. Reg 7009 (Jan. 25, 2021) (directing the Office of Management and Budget, in partnership with agencies, to ensure that agency policies and actions are equitable with respect to race, ethnicity, religion, income, geography, gender identity, sexual orientation, and disability); Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 26, 2021) (requiring the Office of Management and Budget to produce recommendations regarding improving regulatory review that, among other things, "propose procedures that take into account the distributional consequences of regulations . . . to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities").

When seeking early input on ~~rulemaking~~regulatory alternatives, agencies might consider approaches modeled on practices that other agencies already use. In so doing, they might look at agency practices that are required by statute (e.g., the Small Business Regulatory Enforcement Fairness Act ~~(SBREFA)~~)[10] or agency rules (e.g., the Department of Energy's "Process Rule"),[11] or practices that agencies have voluntarily undertaken in the absence of any legal requirement. To the extent permitted by law, agencies might also discuss the extent of their early outreach efforts and their process for selecting among the various alternatives considered in their notices of proposed rulemaking. Doing so allows agencies to demonstrate their serious consideration of the possible alternatives and provides information that will be useful to public commenters during the notice-and-comment process.[12]

Commented [CMA1]: Comment from Senior Fellow Alan B. Morrison: Discussion is OK but with whom — inside agency or out?

Nevertheless, seeking early input on alternatives may not be appropriate in all cases. In some instances, the alternatives may be obvious. In others, the subject matter may be so obscure that public input is unlikely to prove useful. And in all cases, agencies face resource constraints and competing priorities, so agencies may wish to limit early public input to a subclass of rules such as those with substantial impact. Agencies will need to consider whether the benefits of early outreach outweigh the costs, including the resources required to conduct the outreach and any delays entailed. When agencies do solicit early input, they will still want to tailor their outreach to ensure that they are soliciting input in a way that is cost-effective, is equitable, and maximizes the likelihood of obtaining diverse, useful responses.

RECOMMENDATION

1. When determining whether to seek early input from knowledgeable persons to identify potential regulatory alternatives or respond to alternatives an agency has already identified, the agency should consider factors such as:
    a. The extent of the agency's familiarity with the policy issues and key alternatives;

[10] 5 U.S.C. § 609.

[11] 10 C.F.R. § 430, Subpart C, App. A.

[12] *See* Carrigan & Shapiro, *supra* note 1, at 37.

b. The extent to which the ~~issue~~ conduct being regulated or any of the alternatives suggested are novel;
c. The degree to which potential alternatives implicate specialized technical or technological expertise;
d. The complexity of the underlying policy question and the proposed alternatives;
e. The potential magnitude of the costs and benefits of the alternatives proposed;
f. The likelihood that the selection of an alternative will be controversial;
g. The time and resources that conducting such outreach would require;
h. The extent of the agency's discretion to select among alternatives, given the statutory language ~~it is implementing~~being implemented;
i. The deadlines the agency faces, if any, and the harms that might occur from the delay required to solicit and consider early feedback;
j. The extent to which certain groups that are affected by the proposed regulation and have otherwise been underrepresented in the agency's administrative process may suffer adverse distributional effects from generally beneficial proposals; and
k. The extent to which experts in other agencies may have valuable input on alternatives.

2. In determining what outreach to undertake concerning possible regulatory alternatives, an agency should consider using, consistent with available resources and feasibility, methods of soliciting public input including:
   a. Meetings with interested persons held regularly or as-needed based on rulemaking activities;
   b. Listening sessions;
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   d. Focus groups;
   e. Advisory committees, including those tasked with conducting negotiated rulemaking;
   f. Advance notices of proposed rulemakings ~~(ANPRMs)~~; and
   g. Requests for information ~~(RFIs)~~.

The agency should also consider how to ensure that its interactions with outside persons are transparent, to the maximum extent permitted by law.

3. An agency should consider whether the methods it uses to facilitate early outreach in its rulemaking process will engage a wide range of interested persons, including individuals and groups that are affected by the rule and are traditionally underrepresented in the agency's rulemaking processes. The agency should consider which methods would best facilitate such outreach, including providing materials designed for the target participants. For example, highly technical language may be appropriate for some, but not all, audiences. The agency should endeavor to make participation by interested persons who ~~individuals and entities that~~ have less time and fewer resources as easy as possible, particularly when those potential participants do not have experience in the rulemaking process. The agency should explain possible consequences of the potential rulemaking to help potential participants understand the importance of their input and to encourage their participation in the outreach.
4. If an agency is unsure what methods of soliciting public input will best meet its needs and budget, it should consider testing different methods to generate alternatives or receive input on the regulatory alternatives it is considering before issuing notices of proposed rulemaking (NPRMs). As appropriate, the agency should describe the outcomes of using these different methods in the NPRMs for rules in which they are used.
5. An agency should ensure that all its relevant officials, including economists, scientists, and other experts, have an opportunity to identify potential regulatory alternatives during the early input process. As appropriate, the agency should also reach out to select experts in other agencies for input on alternatives.
6. An agency should consider providing in the NPRM a discussion of the reasonable regulatory alternatives it has considered or that have been suggested to it, including alternatives it is not proposing to adopt, together with the reasons it is not proposing to adopt those alternatives. To the extent the agency is concerned about revealing the identity of the individuals or groups offering proposed alternatives due to privacy or confidentiality concerns, it should consider characterizing the identity (e.g., industry

representative, environmental organization, etc.) or listing the alternatives without ascribing them to any particular person.

7. When an agency discusses regulatory alternatives in the preamble of a proposed or final rule, it should also consider including a discussion of any reasonable alternatives suggested or considered through early public input, but which the agency believes are precluded by statute. The discussion should also include an explanation of the agency's views on the legality of those alternatives.
8. To help other agencies craft best practices for early engagement with the public, an agency should, when feasible, share data and other information about the effectiveness of its efforts to solicit early input on regulatory alternatives.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Virtual Hearings in Agency Adjudication

Committee on Adjudication

Proposed Recommendation | June 17, 2021

The use of video teleconferencing (VTC) to conduct administrative hearings and other adjudicative proceedings has become increasingly prevalent over the past few decades due to rapid advances in technology and telecommunications coupled with reduced personnel, increased travel costs, and the challenges of the COVID-19 pandemic. As the Administrative Conference has recognized, "[s]ome applaud the use of VTC by administrative agencies because it offers potential efficiency benefits, such as reducing the need for travel and the costs associated with it, reducing caseload backlog, and increasing scheduling flexibility for agencies and attorneys as well as increasing access for parties."[1] At the same time, as the Conference has acknowledged, critics have suggested that the use of VTC may "hamper communication" among participants—including parties, their representatives, and the decision maker—or "hamper a decision-maker's ability to make credibility determinations."[2]

The Conference has encouraged agencies, particularly those with high-volume caseloads, to consider "whether the use of VTC would be beneficial as a way to improve efficiency and/or reduce costs while also preserving the fairness and participant satisfaction of proceedings."[3] Recognizing that the use of VTC may not be appropriate in all circumstances and must be legally permissible, the Conference has identified factors for agencies to consider when determining

[1] Admin. Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48795, 48795–96 (Aug. 9, 2011).

[2] *Id*.

[3] *Id*.

whether to use VTC to conduct hearings. They include whether the nature and type of adjudicative hearings conducted by an agency are conducive to the use of VTC; whether VTC can be used without adversely affecting case outcomes or representation of parties; and whether the use of VTC would affect costs, productivity, wait times, or access to justice.[4] The Conference has also set forth best practices and practical guidelines for conducting video hearings.[5]

When the Conference issued these recommendations, most video participants appeared in formal hearing rooms equipped with professional-grade video screens, cameras, microphones, speakers, and recording systems. Because these hearing rooms were usually located in government facilities, agencies could ensure that staff were on site to maintain and operate VTC equipment, assist participants, and troubleshoot any technological issues. This setup, which this Recommendation calls a "traditional video hearing," gives agencies a high degree of control over VTC equipment, telecommunications connections, and hearing rooms.

Videoconferencing technology continues to evolve, with rapid developments in internet-based videoconferencing software, telecommunications infrastructure, and personal devices.[6] Recently, many agencies have also allowed, or in some cases required, participants to appear remotely using internet-based videoconferencing software. Because individual participants can run these software applications on personal computers, tablets, or smartphones, they can appear from a location of their choosing, such as a home or office, rather than needing to travel to a video-equipped hearing site. This Recommendation uses the term "virtual hearings" to refer to proceedings in which individuals appear in this manner. This term includes proceedings in which

[4] *Id*. ¶ 2.

[5] Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 Fed. Reg. 75114 (Dec. 17, 2014); Recommendation 2011-4, *supra* note 2; *see also* MARTIN E. GRUEN & CHRISTINE R. WILLIAMS, ADMIN. CONF. OF THE U.S., HANDBOOK ON BEST PRACTICES FOR USING VIDEO TELECONFERENCING IN ADJUDICATORY HEARINGS (2015).

[6] For example, some tribunals around the world are now exploring the use of telepresence systems, which rely on high-quality video and audio equipment to give participants at different, specially equipped sites the experience of meeting in the same physical space. *See* Fredric I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 VAND. J. ENT. & TECH. L. 301, 326 (2021).

all participants appear virtually, as well as hybrid proceedings in which some participants appear virtually while others participate by alternative remote means or in person.[7]

Although some agencies used virtual hearings before 2020, their use expanded dramatically during the COVID-19 pandemic, when agencies maximized telework, closed government facilities to the public and employees, and required social distancing.[8] Agencies gained considerable experience conducting virtual hearings during this period,[9] and this Recommendation draws heavily on these experiences.

Virtual hearings can offer several benefits to agencies and parties compared with traditional video hearings. Participants may be able to appear from their home using their own personal equipment, from an attorney's office, or from another location such as a public library, without the need to travel to a video-equipped hearing site. As a result, virtual hearings can simplify scheduling for parties and representatives and may facilitate the involvement of other participants such as interpreters, court reporters, witnesses, staff or contractors who provide administrative or technical support, and other interested persons. Given this flexibility, virtual hearings may be especially convenient for short and relatively informal adjudicative proceedings, such as pre-hearing and settlement conferences.[10]

But virtual hearings can pose significant challenges as well. The effectiveness of virtual hearings depends on individuals' access to a suitable internet connection, a personal device, and a space from which to participate, as well as their ability to effectively participate in an adjudicative proceeding by remote means while operating a personal device and

[7] *See* Jeremy Graboyes, Legal Considerations for Remote Hearings in Agency Adjudications 3 (June 16, 2020) (report to the Admin. Conf. of the U.S.).

[8] *Id*. at 1.

[9] *See* Fredric I. Lederer & the Ctr. for Legal & Ct. Tech., Analysis of Administrative Agency Adjudicatory Hearing Use of Remote Appearances and Virtual Hearings 6–7 (Apr. 14, 2021) (draft report to the Admin. Conf. of the U.S.).

[10] *See id*.

videoconferencing software. As a result, virtual hearings may create a barrier to access for individuals who belong to underserved communities, such as low-income individuals for whom it may be difficult to obtain access to high-quality personal devices or private internet services, individuals whose disabilities prevent effective engagement in virtual hearings or make it difficult to set up and manage the necessary technology, and individuals with limited English proficiency. Some individuals may have difficulty, feel uncomfortable, or lack experience using a personal device or internet-based videoconferencing software to participate in an adjudicative proceeding. Some critics have also raised concerns that virtual participation can negatively affect parties' satisfaction, engagement with the adjudicative process, or perception of justice.[11]

Agencies have devised several methods to address these concerns. The Board of Veterans' Appeals conducts virtual hearings using the same videoconferencing application that veterans use to access agency telehealth services. To enhance the formality of virtual hearings, many adjudicators use a photographic backdrop that depicts a hearing room, seal, or flag. Many agencies use pre-hearing notices and online guides to explain virtual hearings to participants. Several agencies provide general or pre-hearing training sessions at which agency staff, often attorneys, can familiarize participants with the procedures and standards of conduct for virtual hearings. Though highly effective, these sessions require staff time and availability.[12]

Virtual hearings can also pose practical and logistical challenges. They can suffer from technical glitches, often related to short-term, internet bandwidth issues. Virtual hearings may sometimes require agencies to take special measures to ensure the integrity of adjudicative proceedings. Such measures may be necessary, for example, to safeguard classified, legally protected, confidential, or other sensitive information, or to monitor or sequester witnesses to ensure third parties do not interfere with their testimony.[13] Agencies may also need to take special measures to ensure that interested members of the public can observe virtual hearings in

[11] *See id*. at 8–11, 17.

[12] *See id*. at 10, 16–17.

[13] *See id*. at 11, 15.

appropriate circumstances by, for example, streaming live audio or video of a virtual hearing or providing access to a recording afterward.[14]

Recording virtual hearings may raise additional legal, policy, and practical concerns. To the extent that such recordings become part of the administrative record or serve as the official record of the proceeding, agencies may need to consider whether and for what purposes appellate reviewers may consider and rely on them. Creating recordings may trigger obligations under federal information and record-keeping laws and policies, including the Freedom of Information Act,[15] Privacy Act,[16] and Federal Records Act.[17] Agencies may need to review contract terms when considering the use of videoconferencing software applications to determine whether any other entities own or can access or use recordings made through the applications, or whether an agency may obtain legal and practical ownership of the recording. Steps may be necessary to ensure that agencies do not inadvertently disclose classified, protected, or sensitive information or make it easy for people to use publicly available recordings for improper purposes. Practically, unless agencies store recordings on external servers, such as in the cloud, agencies would need sufficient technological capacity to store the volume of recordings associated with virtual hearings. Agencies would also need personnel qualified and available to manage and, as appropriate, prepare recordings for public access.

This Recommendation builds on Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, and Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, by identifying factors for agencies to

[14] For evidentiary hearings not required by the Administrative Procedure Act (APA), the Conference has recommended that agencies "adopt the presumption that their hearings are open to the public, while retaining the ability to close the hearings in particular cases, including when the public interest in open proceedings is outweighed by the need to protect: (a) National security; (b) Law enforcement; (c) Confidentiality of business documents; and (d) Privacy of the parties to the hearing." Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶ 18, 81 Fed. Reg. 94312, 94316 (Dec. 23, 2016). Similar principles may also apply in other proceedings, including those conducted under the APA's formal-hearing provisions. *See* Graboyes, *supra* note 7, at 22–23.

[15] 5 U.S.C. § 552.

[16] *Id,* § 552a.

[17] 44 U.S.C. § 3101 *et seq*.

consider as they determine when and how to conduct virtual hearings. Specifically, this Recommendation provides practical guidance regarding how best to conduct virtual hearings and encourages agencies to monitor technological and procedural developments that may facilitate remote participation in appropriate circumstances.

As emphasized in Recommendation 2014-7, the Conference is committed to the principles of fairness, efficiency, and participant satisfaction in the conduct of adjudicative proceedings. When virtual hearings are used, they should be used in a manner that promotes these principles, which form the cornerstones of adjudicative legitimacy. The Conference recognizes that the use of virtual hearings is not suitable for every kind of adjudicative proceeding but believes greater familiarity with existing agency practices and awareness of the improvements in technology will encourage broader use of such technology in appropriate circumstances. This Recommendation aims to ensure that, when agencies choose to offer virtual hearings, they are able to provide a participant experience that meets or even exceeds the in-person hearing experience.[18]

RECOMMENDATION

Procedural Practices

1. If legally permissible, agencies should offer virtual hearings consistent with their needs, in accord with principles of fairness and efficiency, and with due regard for participant satisfaction. In considering whether and when to offer virtual hearings, agencies should consider, at a minimum, the following:
    a. Whether the nature and type of adjudicative proceedings are conducive to the use of virtual hearings and whether virtual hearings can be used without affecting the procedural fairness or substantive outcomes of cases;
    b. Whether virtual hearings are likely to result in significant benefits for agency and

[18] This Recommendation does not take a position on when parties should be entitled to, or may request, an in-person hearing.

non-agency participants, including improved access to justice, more efficient use of time for adjudicators and staff, reduced travel costs and delays, and reduced wait times and caseload backlogs;

c. Whether virtual hearings are likely to result in significant costs for agency and non-agency participants, including those associated with purchasing, installing, and maintaining equipment and software, obtaining and using administrative and technical support, and providing training;

d. Whether the use of virtual hearings would affect the representation of parties;

e. Whether the use of virtual hearings would affect communication between hearing participants (including adjudicators, parties, representatives, witnesses, interpreters, agency staff, and others);

f. Whether the use of virtual hearings would create a potential barrier to access for individuals who belong to underserved communities, such as low-income individuals for whom it may be difficult to obtain access to high-quality personal devices or private internet services, individuals whose disabilities prevent effective engagement in virtual hearings or make it difficult to set up and manage the necessary technology, and individuals with limited English proficiency, or for other individuals who may have difficulty using a personal device or internet-based videoconferencing software to participate in adjudicative proceedings;

g. Whether the use of virtual hearings would affect adjudicators' ability to make credibility determinations; and

h. Whether there is a reasonable concern that the use of virtual hearings would enable someone to improperly interfere with participants' testimony.

2. Agencies should revise any provisions of their codified rules of practice that unintentionally restrict adjudicators' discretion to allow individuals to participate virtually, when such participation would otherwise satisfy the principles in Paragraph 1.

3. Agencies should adopt the presumption that virtual hearings are open to the public, while retaining the ability to close the hearings in particular cases, including when the public

interest in open proceedings is outweighed by the need to protect:

a. National security;
b. Law enforcement;
c. Confidentiality of business documents; or
d. Privacy of hearing participants.

For virtual hearings that are open to the public, agencies should provide a means for interested persons to attend or view the hearing.

4. If agencies record virtual hearings, they should consider the legal, practical, and technical implications of doing so and establish guidelines to seek to ensure, at a minimum, compliance with applicable information and recordkeeping laws and policies and guard against misuse of recordings.
5. Agencies should work with information technology and data security professionals to develop protocols to properly safeguard classified, legally protected, confidential, and other sensitive information during virtual hearings and also to ensure the integrity of the hearing process.
6. Agencies that offer virtual hearings should develop guidelines for conducting them, make those guidelines publicly available prominently on their websites, and consider which of those guidelines to include in their codified rules of practice. Such guidelines should address, as applicable:
    a. Any process by which parties, representatives, and other participants can request to participate virtually;
    b. Circumstances in which an individual's virtual participation may be inappropriate;
    c. Any process by which parties, representatives, and other participants can, as appropriate, object to or express concerns about participating virtually;
    d. Technological requirements for virtual hearings, including those relating to access to the internet-based videoconferencing software used for virtual hearings and any technical suggestions for participants who appear virtually;
    e. Standards of conduct for participants during virtual hearings, such as those

requiring participants to disclose whether they are joined or assisted by any silent, off-camera individuals;

f. The availability of or requirement to attend a general training session or pre-hearing conference to discuss technological requirements, procedural rules, and standards of conduct for virtual hearings;

g. Any protocols or best practices for participating in virtual hearings, such as those addressing:

i. When and how to join virtual hearings using either a personal device or equipment available at another location, such as a public library;

ii. How to submit exhibits before or during virtual hearings;

iii. Whether and how to use screen sharing or annotation tools available in the videoconferencing software;

iv. How to make motions, raise objections, or otherwise indicate that a participant would like to speak;

v. How to participate effectively in a virtual setting (e.g., recommending that participants not appear while operating a moving vehicle and, to account for audio delays, that they wait several seconds after others finish talking before speaking);

vi. How to indicate that there is a technical problem or request technical support;

vii. When adjudicators will stop or postpone virtual hearings due to technical problems and what actions will be taken to attempt to remedy the problem;

viii. How to examine witnesses who participate virtually and monitor or sequester them, as necessary;

ix. How parties and their representatives can consult privately with each other;

x. When participants should have their microphones or cameras on or off;

xi. Whether participants may communicate with each other using a videoconferencing software's chat feature or other channels of

communication, and, if so, how;

xii. How to properly safeguard classified, legally protected, confidential, or other sensitive information;

xiii. Whether participants or interested persons may record proceedings;

xiv. Whether and how other interested persons can attend or view streaming video; and

xv. Whether and how participants or interested persons may access recordings of virtual hearings maintained by the agency.

7. Agencies should provide information on virtual hearings in pre-hearing notices to participants. Such notices should include or direct participants to the guidelines described in Paragraph 6.

Facilities and Equipment

8. When feasible, agencies should provide adjudicators with spaces, such as offices or hearing rooms, that are equipped and maintained for the purpose of conducting hearings that involve one or more remote participants. When designing such a space, agencies should provide for:
   a. Dedicated cameras, lighting, and microphones to capture and transmit audio and video of the adjudicator to remote participants;
   b. Adjudicators' access to a computer and a minimum of two monitors—one for viewing remote participants and another for viewing the record—and potentially a third for performing other tasks or accessing other information during proceedings; and
   c. High-quality bandwidth.
9. Agencies should provide adjudicators who appear from a location other than a space described in Paragraph 8 with a digital or physical backdrop that simulates a physical hearing room or other official space.

Training and Support

10. Agencies should provide training for adjudicators on conducting virtual hearings.
11. Agencies should provide adjudicators with adequate technical and administrative support so that adjudicators are not responsible for managing remote participants (e.g., admitting or removing participants, muting and unmuting participants, managing breakout rooms) or troubleshooting technical issues for themselves or other participants before or during proceedings. Agencies should provide advanced training for administrative and technical support staff to ensure they are equipped to manage virtual hearings and troubleshoot technical problems that may arise before or during proceedings.
12. Agencies should consider providing general training sessions or pre-hearing conferences at which staff can explain expectations, technological requirements, and procedural rules for virtual hearings to parties and representatives.

Assessment and Continuing Development

13. Agencies should try to measure how virtual hearings compare with proceedings conducted using other formats, including whether the use of virtual hearings affects procedural fairness or produces different substantive outcomes. Agencies should recognize the methodological challenges in assessing whether different hearing formats produce comparable results.
14. Agencies should collect anonymous feedback from participants (e.g., using post-hearing surveys) to determine and assess participants' satisfaction with the virtual format and identify any concerns. Agencies should also maintain open lines of communication with representatives in order to receive feedback about the use of virtual hearings. Agencies should collect feedback in a manner that complies with the Paperwork Reduction Act and review this feedback on a regular basis to determine whether any previously unrecognized deficiencies exist.
15. Agencies should monitor technological and procedural developments to seek to ensure that options for individuals to participate remotely in adjudicative proceedings remain

current and that those options reasonably comport with participants' expectations.

16. Agencies should share information with each other in order to reduce costs, increase efficiency, and provide a hearing experience that seeks to ensure fairness and participant satisfaction. To help carry out this Recommendation, the Conference's Office of the Chairman should provide, as authorized by 5 U.S.C. § 594(2), for the "interchange among administrative agencies of information potentially useful in improving" virtual hearings and other forms of remote participation in agency adjudicative proceedings.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Virtual Hearings in Agency Adjudication

Committee on Adjudication

Proposed Recommendation | June 17, 2021

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council (with sources shown in the margin).

The use of video teleconferencing (VTC) to conduct administrative hearings and other adjudicative proceedings has become increasingly prevalent over the past few decades due to rapid advances in technology and telecommunications coupled with reduced personnel, increased travel costs, and the challenges of the COVID-19 pandemic. As the Administrative Conference has recognized, "[s]ome applaud the use of VTC by administrative agencies because it offers potential efficiency benefits, such as reducing the need for travel and the costs associated with it, reducing caseload backlog, and increasing scheduling flexibility for agencies and attorneys as well as increasing access for parties."[1] At the same time, as the Conference has acknowledged, critics have suggested that the use of VTC may "hamper communication" among participants—including parties, their representatives, and the decision maker—or "hamper a decision-maker's ability to make credibility determinations."[2]

The Conference has encouraged agencies, particularly those with high-volume caseloads, to consider "whether the use of VTC would be beneficial as a way to improve efficiency and/or

[1] Admin. Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48795, 48795–96 (Aug. 9, 2011).

[2] *Id.*

reduce costs while also preserving the fairness and participant satisfaction of proceedings."[3] Recognizing that the use of VTC may not be appropriate in all circumstances and must be legally permissible, the Conference has identified factors for agencies to consider when determining whether to use VTC to conduct hearings. They include whether the nature and type of adjudicative hearings conducted by an agency are conducive to the use of VTC; whether VTC can be used without adversely affecting case outcomes or representation of parties; and whether the use of VTC would affect costs, productivity, wait times, or access to justice.[4] The Conference has also set forth best practices and practical guidelines for conducting video hearings.[5]

When the Conference issued these recommendations, most video participants appeared in formal hearing rooms equipped with professional-grade video screens, cameras, microphones, speakers, and recording systems. Because these hearing rooms were usually located in government facilities, agencies could ensure that staff were on site to maintain and operate VTC equipment, assist participants, and troubleshoot any technological issues. This setup, which this Recommendation calls a "traditional video hearing," gives agencies a high degree of control over VTC equipment, telecommunications connections, and hearing rooms.

Videoconferencing technology continues to evolve, with rapid developments in internet-based videoconferencing software, telecommunications infrastructure, and personal devices.[6] Recently, many agencies have also allowed, or in some cases required, participants to appear remotely using internet-based videoconferencing software. Because individual participants can run these software applications on personal computers, tablets, or smartphones, they can appear

[3] *Id.*

[4] *Id.* ¶ 2.

[5] Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 Fed. Reg. 75114 (Dec. 17, 2014); Recommendation 2011-4, *supra* note 2; *see also* MARTIN E. GRUEN & CHRISTINE R. WILLIAMS, ADMIN. CONF. OF THE U.S., HANDBOOK ON BEST PRACTICES FOR USING VIDEO TELECONFERENCING IN ADJUDICATORY HEARINGS (2015).

[6] For example, some tribunals around the world are now exploring the use of telepresence systems, which rely on high-quality video and audio equipment to give participants at different, specially equipped sites the experience of meeting in the same physical space. *See* Fredric I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 VAND. J. ENT. & TECH. L. 301, 326 (2021).

from a location of their choosing, such as a home or office, rather than needing to travel to a video-equipped hearing site. This Recommendation uses the term "virtual hearings" to refer to proceedings in which individuals appear in this manner. This term includes proceedings in which all participants appear virtually, as well as hybrid proceedings in which some participants appear virtually while others participate by alternative remote means or in person.[7]

Although some agencies used virtual hearings before 2020, their use expanded dramatically during the COVID-19 pandemic, when agencies maximized telework, closed government facilities to the public and employees, and required social distancing.[8] Agencies gained considerable experience conducting virtual hearings during this period,[9] and this Recommendation draws heavily on these experiences.

Virtual hearings can offer several benefits to agencies and parties compared with traditional video hearings. Participants may be able to appear from their home using their own personal equipment, from an attorney's office, or from another location such as a public library or other conveniently located governmental facility, without the need to travel to a video-equipped hearing site. As a result, virtual hearings can simplify scheduling for parties and representatives and may facilitate the involvement of other participants such as interpreters, court reporters, witnesses, staff or contractors who provide administrative or technical support, and other interested persons. Given this flexibility, virtual hearings may be especially convenient for short and relatively informal adjudicative proceedings, such as pre-hearing and settlement conferences.[10]

Commented [CA1]: Proposed Amendment from Council # 1 (see parallel amendment at lines 200–201 below)

[7] *See* Jeremy Graboyes, Legal Considerations for Remote Hearings in Agency Adjudications 3 (June 16, 2020) (report to the Admin. Conf. of the U.S.).

[8] *Id.* at 1.

[9] *See* Fredric I. Lederer & the Ctr. for Legal & Ct. Tech., Analysis of Administrative Agency Adjudicatory Hearing Use of Remote Appearances and Virtual Hearings ~~6~~–7 (June 3~~Apr. 14~~, 2021) (~~draft~~ report to the Admin. Conf. of the U.S.).

[10] *See id.* at 3.

Because virtual hearings allow participants to appear from a location of their choosing without needing to travel to a facility suitable for conducting an in-person or traditional video hearing, they have the potential to expand access to justice for individuals who belong to certain underserved communities. Virtual hearings may be especially beneficial for individuals whose disabilities make it difficult to travel to hearing facilities or participate in public settings; individuals who live in rural areas and may need to travel great distances to hearing facilities; and low-income individuals for whom it may be difficult to secure transportation to hearing facilities or take time off work or arrange for childcare to participate in in-person or traditional video hearings. The use of virtual hearings may also expand access to representation, especially for individuals who live in areas far from legal aid organizations.[11]

Commented [CA2]: Proposed Amendment from Council # 2 (including new footnote 11)

But virtual hearings can pose significant challenges as well. The effectiveness of virtual hearings depends on individuals' access to a suitable internet connection, a personal device, and a space from which to participate, as well as their ability to effectively participate in an adjudicative proceeding by remote means while operating a personal device and videoconferencing software. As a result, virtual hearings may create a barrier to access for individuals who belong to underserved communities, such as low-income individuals for whom it may be difficult to obtain access to high-quality personal devices or private internet services, individuals whose disabilities prevent effective engagement in virtual hearings or make it difficult to set up and manage the necessary technology, and individuals with limited English proficiency. Some individuals may have difficulty, feel uncomfortable, or lack experience using a personal device or internet-based videoconferencing software to participate in an adjudicative proceeding. Some critics have also raised concerns that virtual participation can negatively affect parties' satisfaction, engagement with the adjudicative process, or perception of justice.[12]

[11] *See* ALICIA BANNON & JANNA ADELSTEIN, BRENNAN CTR. FOR JUSTICE, THE IMPACT OF VIDEO PROCEEDINGS ON FAIRNESS AND ACCESS TO JUSTICE IN COURT 9–10 (2020); NAT'L CTR. FOR STATE CTS., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 37–38 (2016); Lederer, *supra* note 6, at 338; Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1313–14 (2020).

[12] *See* Lederer, *supra* note 9, at 8–12, 18~~*id.* at 8–11, 17~~.

Agencies have devised several methods to address these concerns. The Board of Veterans' Appeals conducts virtual hearings using the same videoconferencing application that veterans use to access agency telehealth services. To enhance the formality of virtual hearings, many adjudicators use a photographic backdrop that depicts a hearing room, seal, or flag. Many agencies use pre-hearing notices and online guides to explain virtual hearings to participants. Several agencies provide general or pre-hearing training sessions at which agency staff, often attorneys, can familiarize participants with the procedures and standards of conduct for virtual hearings. Though highly effective, these sessions require staff time and availability.[13]

Virtual hearings can also pose practical and logistical challenges. They can suffer from technical glitches, often related to short-term, internet bandwidth issues. Virtual hearings may sometimes require agencies to take special measures to ensure the integrity of adjudicative proceedings. Such measures may be necessary, for example, to safeguard classified, legally protected, confidential, or other sensitive information, or to monitor or sequester witnesses to ensure third parties do not interfere with their testimony.[14] Agencies may also need to take special measures to ensure that interested members of the public can observe virtual hearings in appropriate circumstances by, for example, streaming live audio or video of a virtual hearing or providing access to a recording afterward.[15]

Recording virtual hearings may raise additional legal, policy, and practical concerns. To the extent that such recordings become part of the administrative record or serve as the official record of the proceeding, agencies may need to consider whether and for what purposes appellate

[13] *See id*. at ~~10~~12, 16–17.

[14] *See id*. at ~~11~~12, ~~15~~17.

[15] For evidentiary hearings not required by the Administrative Procedure Act (APA), the Conference has recommended that agencies "adopt the presumption that their hearings are open to the public, while retaining the ability to close the hearings in particular cases, including when the public interest in open proceedings is outweighed by the need to protect: (a) National security; (b) Law enforcement; (c) Confidentiality of business documents; and (d) Privacy of the parties to the hearing." Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶ 18, 81 Fed. Reg. 94312, 94316 (Dec. 23, 2016). Similar principles may also apply in other proceedings, including those conducted under the APA's formal-hearing provisions. *See* Graboyes, *supra* note 7, at 22–23.

reviewers may consider and rely on them. Creating recordings may trigger obligations under federal information and record-keeping laws and policies, including the Freedom of Information Act,[16] Privacy Act,[17] and Federal Records Act.[18] Agencies may need to review contract terms when considering the use of videoconferencing software applications to determine whether any other entities own or can access or use recordings made through the applications, or whether an agency may obtain ~~legal and practical~~ ownership and possession of the recording. Steps may be necessary to ensure that agencies do not inadvertently disclose classified, protected, or sensitive information or make it easy for people to use publicly available recordings for improper purposes. Practically, unless agencies store recordings on external servers, such as in the cloud, agencies would need sufficient technological capacity to store the volume of recordings associated with virtual hearings. Agencies would also need personnel qualified and available to manage and, as appropriate, prepare recordings for public access.

This Recommendation builds on Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, and Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, by identifying factors for agencies to consider as they determine when and how to conduct virtual hearings. Specifically, this Recommendation provides best practices for ~~practical guidance regarding how best to~~ conducting virtual hearings in appropriate circumstances and encourages agencies to monitor technological and procedural developments that may facilitate remote participation in appropriate circumstances.

Commented [CA3]: Proposed Amendment from Council # 3

As emphasized in Recommendation 2014-7, the Conference is committed to the principles of fairness, efficiency, and participant satisfaction in the conduct of adjudicative proceedings. When virtual hearings are used, they should be used in a manner that promotes these principles, which form the cornerstones of adjudicative legitimacy. The Conference

[16] 5 U.S.C. § 552.

[17] *Id,* § 552a.

[18] 44 U.S.C. § 3101 *et seq*.

recognizes that the use of virtual hearings is not suitable for every kind of adjudicative proceeding but believes greater familiarity with existing agency practices and awareness of the improvements in technology will encourage broader use of such technology in appropriate circumstances. This Recommendation aims to ensure that, when agencies choose to offer virtual hearings, they are able to provide a participant experience that meets or even exceeds the in-person hearing experience.[19]

RECOMMENDATION

Procedural Practices

1. If legally permissible, agencies should offer virtual hearings consistent with their needs, in accord with principles of fairness and efficiency, and with due regard for participant satisfaction. In considering whether and when to offer virtual hearings, agencies should consider, at a minimum, the following:
    a. Whether the nature and type of adjudicative proceedings are conducive to the use of virtual hearings and whether virtual hearings can be used without affecting the procedural fairness or substantive outcomes of cases;
    b. Whether virtual hearings are likely to result in significant benefits for agency and non-agency participants, including improved access to justice, more efficient use of time for adjudicators and staff, reduced travel costs and delays, and reduced wait times and caseload backlogs;
    c. Whether virtual hearings are likely to result in significant costs for agency and non-agency participants, including those associated with purchasing, installing, and maintaining equipment and software, obtaining and using administrative and technical support, and providing training;
    d. Whether the use of virtual hearings would affect the representation of parties;
    e. Whether the use of virtual hearings would affect communication between hearing

[19] This Recommendation does not take a position on when parties should be entitled to, or may request, an in-person hearing.

participants (including adjudicators, parties, representatives, witnesses, interpreters, agency staff, and others);

f. Whether the use of virtual hearings would create a potential barrier to access for individuals who belong to underserved communities, such as low-income individuals for whom it may be difficult to obtain access to high-quality personal devices or private internet services, individuals whose disabilities prevent effective engagement in virtual hearings or make it difficult to set up and manage the necessary technology, and individuals with limited English proficiency, or for other individuals who may have difficulty using a personal device or internet-based videoconferencing software to participate in adjudicative proceedings;

g. Whether the use of virtual hearings would affect adjudicators' ability to make credibility determinations; and

h. Whether there is a reasonable concern that the use of virtual hearings would enable someone to improperly interfere with participants' testimony.

2. Agencies should revise any provisions of their codified rules of practice that unintentionally restrict adjudicators' discretion to allow individuals to participate virtually, when such participation would otherwise satisfy the principles in Paragraph 1.

3. Agencies should adopt the presumption that virtual hearings are open to the public, while retaining the ability to close the hearings in particular cases, including when the public interest in open proceedings is outweighed by the need to protect:

   a. National security;

   b. Law enforcement;

   c. Confidentiality of business documents; or

   d. Privacy of hearing participants.

   For virtual hearings that are open to the public, agencies should provide a means for interested persons to attend or view the hearing.

4. If agencies record virtual hearings, they should consider the legal, practical, and technical implications of doing so and establish guidelines to seek to ensure, at a minimum, compliance with applicable information and recordkeeping laws and policies and guard

against misuse of recordings.

5. Agencies should work with information technology and data security professionals to develop protocols to properly safeguard classified, legally protected, confidential, and other sensitive information during virtual hearings and also to ensure the integrity of the hearing process.
6. Agencies that offer virtual hearings should develop guidelines for conducting them, make those guidelines publicly available prominently on their websites, and consider which of those guidelines to include in their codified rules of practice. Such guidelines should address, as applicable:
    a. Any process by which parties, representatives, and other participants can request to participate virtually;
    b. Circumstances in which an individual's virtual participation may be inappropriate;
    c. Any process by which parties, representatives, and other participants can, as appropriate, object to or express concerns about participating virtually;
    d. Technological requirements for virtual hearings, including those relating to access to the internet-based videoconferencing software used for virtual hearings and any technical suggestions for participants who appear virtually;
    e. Standards of conduct for participants during virtual hearings, such as those requiring participants to disclose whether they are joined or assisted by any silent, off-camera individuals;
    f. The availability of or requirement to attend a general training session or pre-hearing conference to discuss technological requirements, procedural rules, and standards of conduct for virtual hearings;
    g. Any protocols or best practices for participating in virtual hearings, such as those addressing:
        i. When and how to join virtual hearings using either a personal device or equipment available at another location, such as a public library or other governmental facility;

Commented [CA4]: Proposed Amendment from Council # 1 (see parallel amendment at line 47 above)

ii. How to submit exhibits before or during virtual hearings;
iii. Whether and how to use screen sharing or annotation tools available in the videoconferencing software;
iv. How to make motions, raise objections, or otherwise indicate that a participant would like to speak;
v. How to participate effectively in a virtual setting (e.g., recommending that participants not appear while operating a moving vehicle and, to account for audio delays, that they wait several seconds after others finish talking before speaking);
vi. How to indicate that there is a technical problem or request technical support;
vii. When adjudicators will stop or postpone virtual hearings due to technical problems and what actions will be taken to attempt to remedy the problem;
viii. How to examine witnesses who participate virtually and monitor or sequester them, as necessary;
ix. How parties and their representatives can consult privately with each other;
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7. Agencies should provide information on virtual hearings in pre-hearing notices to

participants. Such notices should include or direct participants to the guidelines described in Paragraph 6.

Facilities and Equipment

8. When feasible, agencies should provide adjudicators with spaces, such as offices or hearing rooms, that are equipped and maintained for the purpose of conducting hearings that involve one or more remote participants. When designing such a space, agencies should provide for:
    a. Dedicated cameras, lighting, and microphones to capture and transmit audio and video of the adjudicator to remote participants;
    b. Adjudicators' access to a computer and a minimum of two monitors—one for viewing remote participants and another for viewing the record—and potentially a third for performing other tasks or accessing other information during proceedings; and
    c. High-quality bandwidth.
9. Agencies should provide adjudicators who appear from a location other than a space described in Paragraph 8 with a digital or physical backdrop that simulates a physical hearing room or other official space.

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10. Agencies should provide training for adjudicators on conducting virtual hearings.
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12. Agencies should consider providing general training sessions or pre-hearing conferences

at which staff can explain expectations, technological requirements, and procedural rules for virtual hearings to parties and representatives.

Assessment and Continuing Development

13. Agencies should try to measure how virtual hearings compare with proceedings conducted using other formats, including whether the use of virtual hearings affects procedural fairness or produces different substantive outcomes. Agencies should recognize the methodological challenges in measuring procedural fairness and comparing substantive outcomes to determine ~~assessing~~ whether different hearing formats, apart from other relevant factors and case-specific circumstances, produce comparable results.
14. Agencies should collect anonymous feedback from participants (e.g., using post-hearing surveys) to determine and assess participants' satisfaction with the virtual format and identify any concerns. Agencies should also maintain open lines of communication with representatives in order to receive feedback about the use of virtual hearings. Agencies should collect feedback in a manner that complies with the Paperwork Reduction Act and review this feedback on a regular basis to determine whether any previously unrecognized deficiencies exist.
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16. Agencies should share information with each other ~~in order~~ to reduce costs, increase efficiency, and provide a hearing experience that seeks to ensure fairness and participant satisfaction. To help carry out this Recommendation, the Conference's Office of the Chairman should provide, as authorized by 5 U.S.C. § 594(2), for the "interchange among administrative agencies of information potentially useful in improving" virtual hearings and other forms of remote participation in agency adjudicative proceedings.

Commented [CA5]: Proposed Amendment from Council # 4

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